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MORTGAGES

IN

CALIFORNIA.

A PRACTICAL ESSAY,

BY

JAMES DE FREMERY.

SAN FRANCISCO:
J. J. LECOUNT, PUBLISHER.
1860.

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PREFACE.

A residence in California from 1849 to the present time, experience in the investment here of capital, and the loss of time necessarily involved in obtaining a practical knowledge of the laws directly and indirectly affecting mortgages in this State, in the absence of a concise publication on the subject, suggested to the writer the utility of the present essay, which is chiefly intended as a means of information for such as have, or may have, funds invested here under his care.

Actual results demonstrate that loaning on mortgage in California, as in many other countries, is a very desirable mode of placing funds at interest, provided it be done with that care and prudence which should everywhere be observed in the matter of mortgages,—which does not forget the lesson: *in dubio abstine*,—and which takes into due consideration the influence which various changes of circumstances may have.

So likewise has experience shown that in this State, right and justice for the mortgagee, as well as for the mortgagor, are in harmony, and that the taking of money on mortgage may in a great degree promote the interests of the mortgagor. It is true, the interest on mortgages, though not high in comparison with the rates of interest paid on all other loans, is much higher here than in many other countries, the supply of capital not being equal to the large demand for it; but mortgagors on the other hand may derive in proportion greater benefits from its use. The principal cause hereof is the peculiar nature of circumstances in California, which offers

so wide a field for industry, and for the development of its resources generally, and where the words of the Lord: "replenish the earth," are finding their fulfilment in such a striking manner.

The experience obtained in investing money in California, in the discharge of his duties as agent of several capitalists, and under the advice habitually sought, for a course of years, of counsel of extended business and conceded position at the San Francisco bar—to whom also his acknowledgments are due for valuable suggestions on reading his sketch,—has enabled the writer to compile the information which is contained in this essay.

It is submitted as a synopsis of legal principles, governing actual cases which may be encountered by capitalists placing money on mortgage in this State, but as will be readily perceived by a reference to its contents, it formed no part of the author's plan to furnish a systematic treatise upon the theory of mortgage securities.

Of such works there are several of undoubted authority, as for instance, Hilliard's valuable work on the Law of Mortgages, but they are necessarily voluminous, covering the whole subject of the law of mortgages and its analogies. Besides, without previous professional reading and attainments, they are difficult of application, if not for want of time to investigate, practically inaccessible to the mass of business men; and it is to such, and to all others who feel an interest in the matter, that the following pages are now offered by one of their class.

JAMES DE FREMERY.

SAN FRANCISCO, February, 1860.

LIST OF REPORTS REFERRED TO.

Add. & Ell.	Adolphus & Ellis' Reports, Queen's Bench.
B. & Ad.	Barnewall & Adolphus' Rep. King's Bench.
Barb.	Barbour's Rep. Supreme Court of New York.
Barb. Ch.	Barbour's Rep. Court of Chancery of New York.
Blackf.	Blackford's Rep. Supreme Court of Indiana.
Cal. Rep.	Reports of the Supreme Court of California.
Chev.	Cheve's Rep. Court of Appeals, South Carolina.
Cond. R.	Peters' Condensed Rep. United States Supreme Court.
Conn.	Reports of the Supreme Court of Connecticut.
Cow.	Cowen's Rep. Supreme Court of New York.
Cranch.	Cranch's Rep. U. S. Supreme Court.
Dall.	Dallas' Rep. U. S. Supreme Court, etc.
Denio.	Denio's Rep. Supreme Court of New York.
Dev.	Devereux's (Law) Rep. Supreme Court, North Carolina.
Edw. Adm.	Edward's Admiralty Reports, (Eng.)
Eng. Law and Eq.	English Rep. in Law and Equity, House of Lords, etc.
Freem. Ch.	Freeman's Chancery cases (Eng.)
Gallis.	Gallison's Rep. U. S. Circuit Court, 1st Circuit.
Geo.	Reports of the Supreme Court of Georgia.
Gilman.	Gilman's Rep. Supreme Court, Illinois.
Halst. Ch.	Halsted's Rep. Court of Chancery, New Jersey.
Hare.	Hare's Rep. High Court of Chancery, England.
How. S. C. Rep.	Howard's Rep. U. S. Supreme Court.
Illin.	Reports of the Supreme Court of Illinois.
Johns.	Johnson's Rep. Supreme Court, New York.
John. Ch.	Johnson's Rep. Court of Chancery, New York.
Labatt.	Labatt's Rep. District Courts, California.
Leigh.	Leigh's Rep. Court of Appeals, Virginia.
Mad.	Maddock's Rep. Vice Chancellor of England's Court.
Maine.	Reports of the Supreme Court of Maine.
Marshall, J. J.	J. J. Marshall's Rep. Court of Appeals, Kentucky.
Mason.	Mason's Rep. U. S. Circuit Court, 1st Circuit.
McAllister.	McAllister's Rep. U. S. Circuit Court for California.
McL.	McLean's Rep. U. S. Circuit Court, 7th Circuit.

Met.	Metcalf's Rep. Supreme Court of Massachusetts.
Monroe.	Monroe's Rep. Court of Appeals of Kentucky.
Monroe B.	B. Monroe's Rep. Court of Appeals, Kentucky.
Ohio.	Reports of the Supreme Court of Ohio.
Paige.	Paige's Rep. Court of Chancery, State of New York.
Paine C. C. R.	Paine's Rep. U. S. Circuit Court, 2d Circuit.
Parker.	Parker's Rep. Court of Exchequer.
Peters' C. C. R.	Peters' Rep. U. S. Circuit Court, 3d Circuit.
Peters' R.	Peters' Rep. U. S. Supreme Court.
Pick.	Pickering's Rep. Supreme Court, Massachusetts.
Sandf. Ch.	Sandford's Rep. Court of Chancery, New York.
Sch. & Lef.	Schoals & Lefroy's Irish Chancery Reports.
Seld.	Selden's Rep. Court of Appeals, New York.
Sm. & M.	Smedes & Marshall's Rep. High Court of Errors and Appeals, Mississippi.
Sumn.	Sumner's Rep. U. S. Circuit Court, 1st Circuit.
Ves. jun.	Vesey jun's Rep. High Court of Chancery, Eng.
Walk. Ch.	Walker's Rep. Ch Michigan.
Wendell.	Wendell's Rep. Supreme Court, New York.
Wheat.	Wheaton's Rep. U. S. Supreme Court.

April T. 1859.
July T. 1859.
Oct. T. 1859.
Jany. T. 1860.

Decisions rendered at the respective Terms of the Supreme Court of California, the official reports of which have not yet been printed.

Wood's Digest. Digest of the statutes of California, compiled in pursuance of an act of the Legislature of 1857, as in force at that time.

CONTENTS.

INTRODUCTORY REMARKS, ... xv

CHAPTER I.

AGENCY.—ALIENAGE.—EFFECT OF WAR.

AGENCY.

Page

§ 1. Powers to be given to an Agent, ... 1
2. Powers of Attorney are strictly construed. Are to be acknowledged and recorded. Revocation, ... 1
3. Investment in the name of a person residing in the State, . 2

ALIENAGE.

4. The common law of England is the rule of decision in the courts, 2
5. It enables aliens to hold personal property, ... 3
6. Including mortgages,—which the alien may foreclose, . . . 3
7. Constitutional right of resident aliens to the possession, etc., of property, ... 3
8. Statutory right of aliens to hold by inheritance, disposition of unclaimed estates, ... 4
9. The rights of aliens may be affected by treaties, ... 5
10. Right of aliens to sue in U. S. courts. Removal to such courts, of suits brought against them in State courts, . . . 6
11. Jurisdiction of the U. S. courts, ... 7
12. Cases in which it does not apply, ... 7
13. An absentee must be sued in a State court, ... 8
14. The federal courts to take cognizance of the laws of the State. Not so obliged in equity proceedings, ... 8
15. Appeal to the U. S. Supreme Court, ... 9

EFFECT OF WAR.

16. War does not affect the rights of aliens residing in the State, . 10
17. Enemy's property liable to confiscation, during, but not after the war, ... 10
18. Whether property within the country at the commencement of hostilities is so liable, ... 11
19. The rule that this property is not liable to confiscation considered, 12
20. Such property could only be confiscated under an act of Congress, but no such act exists, ... 12

INTEREST.

Page

§ 62. Interest allowed at ten per cent. per annum, where not differently stipulated. Any rate may be agreed upon. Judgment to carry the same rate. Interest may be compounded, . . 38

MORTGAGE.

63. Nature of mortgage; is a mere lien to secure money. The mortgage does not entitle its owner to possession, . . . 39
64. Form the same as of conveyance, but void on payment, and authorizing sale or foreclosure on default, . . . 39
65. Mortgage deed to waive homestead right, etc., and to stipulate the payment of taxes and other charges, ... 40
66. Terms for which mortgages are made. Not generally continued beyond four years after maturity, ... 40
67. Question whether the mortgage can be enforced, after action on the note is barred. Affirmative decisions, . . . 40
68. Though the right to enforce be recognized, no *personal* judgment can be obtained, ... 42

HOMESTEAD.

69. Constitutional right of homestead, ... 42
70. Not to exceed five thousand dollars. Exempted from forced sale for debt, ... 42
71. Liens to which this exemption does not extend. Mortgage on homestead when valid, ... 43
72. Homestead to be set apart for surviving wife and children, . 43
73. Definition of homestead, how alienated, and how the premises may be divested of the character of homestead, . . . 43
74. Which description of property can become the homestead, . 44

SEPARATE PROPERTY.

75. What constitutes separate property of husband and wife respectively. What constitutes common property. Subject to marriage contract, ... 45
76. Inventory of the wife's separate property. How to be made out and recorded. Such property exempt from forced sale for debts of husband; may be alienated in a certain manner, . 45
77. How it may be alienated by the wife, after one year's absence of her husband, ... 46

TAXES.

78. All property, except churches, etc., is subject to taxation. Certain provisions of the revenue laws as to lien of tax, . . . 46
79. Equalization of taxes. Sale for delinquent taxes, . . . 47
80. Redemption, conveyance, nature of title conveyed as expressed in the law, ... 47
81. Mortgagee authorized to pay taxes. Mortgagor purchasing at tax sale, does not impair the mortgage lien, ... 48

INSURANCE.

82. Insurance, how made for the protection of mortgagees, . 48

CHAPTER IV.

POSSESSION.—FIXTURES.—MECHANIC'S LIEN.—WASTE.

POSSESSION.

Page

§ 83. Is an important element of title. When notice. Why the mortgagor should be in possession, ... 50

FIXTURES.

84. A mortgage carries with it all fixtures. They cannot be removed by the mortgagor, ... 51

85. Including the crops growing at the time of sale, ... 52

MECHANIC'S LIEN.

86. Definition. The ground subject to the lien, without impairing previous incumbrances. Lien for inproving lots and adjoining streets, ... 52

87. Notice to be filed within sixty days. Action to be brought within a certain period. Notification of trial. Liens under the act not then presented, to be deemed waived, ... 53

88. Persons dealing with the property during progress of the work, are charged with notice. Original contract not to be altered so as to injure third parties. Mechanic's lien subsequent to mortgage, is subordinate to it, ... 53

WASTE.

89. The law will protect the mortgagee against waste. From commencement of action the statute directly interferes, . 54

90. Injunction against waste during foreclosure, ... 55

91. Recovery by the purchaser of damages for injury, . . . 55

CHAPTER V.

ASSIGNMENT.—RELEASE.

ASSIGNMENT.

92. Mortgage and debt, how usually assigned. Endorsement of note carries the mortgage, ... 56

93. The debt and the security cannot be separated, ... 56

94. Assignment of mortgage made to a married woman, . . . 57

95. The assignee takes subject to existing equities. Exception to this rule, 57

96. Amount due on assignment to be ascertained. Notice to be given to the mortgagor. Payments before notice held to be valid against the assignee, ... 58

97. Both objects attained if the mortgagor be a party to the assignment, 58

RELEASE.

98. Only payment, or release, will discharge the mortgage; but the debt may be extinguished as a personal claim, . . . 59

99. Or the land may be released from the lien, without affecting the liability on the note. Position of the mortgagee with reference to subsequent incumbrances, where he gives a partial release, 59

100. Discharge of mortgage by entry on margin of record, . . 60

101. Or by certificate of discharge, ... 61

102. Such certificate to be recorded, ... 61

CHAPTER VI.

EQUITY OF REDEMPTION. — SETTLEMENT ON DEATH OF MORTGAGOR. — FORECLOSURE. — SALE. — REDEMPTION.

EQUITY OF REDEMPTION.

Page

§ 103. At common law the legal estate vests in the mortgagee and becomes absolute on default. Equitable right of redemption allowed within twenty years. How barred, the mortgagee remaining absolute owner, ... 62
104. In California the mortgagor remains owner. His equity of redemption, ... 63
105. Who entitled to redeem. Whether barred by the decree of foreclosure, or by the sale under it, ... 63
106. The equity of redemption is the real estate in the land which the mortgagor may convey, ... 63

SETTLEMENT ON DEATH OF MORTGAGOR.

107. How claims against the estate are to be presented. Sale, when valid. Its proceeds to pay the mortgage. Any part unpaid ranks as a judgment, ... 63
108. Whether District Courts have jurisdiction of these matters. Decisions on this point, ... 64
109. Property levied on before death, may be sold. Similar cases, . 65

FORECLOSURE.

110. Action on default. Whether a receiver can be appointed, . 66
111. Nature of foreclosure suit. Proceeds of sale to pay the mortgage. Execution for deficiency. Suit to be brought in the proper county, ... 66
112. Who are to be made parties to the suit, ... 67
113. Service of the summons. By publication in certain cases, . 68
114. Debt to be proved. The action does not abate by the death of a party, or by transfer of any interest, ... 68
115. Manner of rendering judgment. Judgment a lien on the debtors real property, ... 69
116. Appeal. How to stay execution. An appeal does not impair the lien, ... 69

SALE.

117. Sale. Postponement by plaintiff, ... 70
118. Order of sale in certain cases. The sale ceases when a sufficient amount is realized, unless the property cannot be sold in portions, ... 71
119. Execution for deficiency, ... 71
120. The purchaser takes subject to existing incumbrances. Remarks on the sale, ... 71
121. Statutory right of redemption applicable to mortgages, seldom availed of, ... 73

REDEMPTION.

Page

§ 122. Who entitled to redeem within six months and on what terms, 74
123. Redemption from a redemptioner within sixty days. Conveyance, when made. 74
124. To whom payment may be made, on production of certain documents, ... 75
125. The court may restrain waste during time allowed for redemption, 76
126. The purchaser or redemptioner entitled to the rent or its value, 76
127. And to a conveyance and possession, after expiration of the time for redemption, ... 77
128. How this right to redeem affects certain parties, ... 77

CHAPTER VII.

DEEDS OF TRUST.

129. Conveyance in trust for payment of debt, ... 78
130. The trustee to sell upon default. Conditions relating to sale, 78
131. Such deed of trust not subject to foreclosure; nor a sale under it to redemption. Wherein different from a mortgage, . . 79
142. Advantages derived from securing money in this manner, . 80
143. The deed may provide for new trustees; if not, the court will appoint when necessary, ... 80

CHAPTER VIII.

LIMITATION.

134. The periods within which civil actions may be commenced, is limited by statute. Will have the effect of perfecting titles to real property. Action to be commenced within the periods described, ... 81
134.* Limitation of suits by the State, for real property, . . . 82
135. Action for recovery of real property, its rents, etc. How affected by adverse possession, ... 82
135.* Time not to run during certain disabilities, ... 83
136. Actions other than for the recovery of real property. When an action shall be deemed commenced, ... 83
137. Where defendant is absent from the State. When a person is an alien enemy, ... 84
138. Where judgment is reversed. Where action stayed by injunction, etc, ... 84
139. Disabilities can not be availed of unless existing when cause of action accrues. Evidence of a new or continuing contract to be in writing, ... 84

ERRATUM.

Page 74, in note e after the words : "If the mortgagee or creditor," the following line has been omitted :

for a debt contracted under the act, previous to its amendment in 1859,

For other errata and addenda, see after page 84.

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INTRODUCTORY REMARKS.

The object of these pages is to exhibit the manner in which loans may be secured by mortgage on real property, in the State of California, and the contingencies, benefits and remedies to which such investments are subject. It is not intended, however, to treat at large the particular questions which under exceptional circumstances may arise, but only to state generally the principal points connected with mortgages; and this more especially with reference to the position of the mortgagee, under a first mortgage on real estate, given to secure money borrowed, and the remedial measures in case of non-payment of the debt.

Much space comparitively, has been given to a definition of the rights of aliens as mortgagees, of which it would have been difficult to give a clear view within narrower limits.

None but the best authorities, of acknowledged influence in the settlement of judicial principles, have been quoted. Though in many instances only one or two decisions have been cited; these will on examination prove to refer to numerous other cases sustaining the same or similar views.

The laws of the State of California, and the decisions of

her Supreme Court, have been examined up to the last day of January of the present year, 1860, and cited where necessary.

No allusion has been made to the laws and usages governing the possession and transfer of mining claims and water-ditches, as, for various reasons, these securities do not come within the range of investments made by the writer.

The Constitution of the State of California provides, art. I, sec. 16, that no *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed. This provision will not be changed, much less repealed, as the individual States are prohibited from passing such laws by the Constitution of the United States, art. I, sec. 10.

MORTGAGES IN CALIFORNIA.

A PRACTICAL ESSAY.

CHAPTER I.

AGENCY.—ALIENAGE.—EFFECT OF WAR.

AGENCY.

§ 1. If not present in the State, the first object of the capitalist is to select a careful and reliable agent, who must be vested with authority to loan the money entrusted to him, collect both principal and interest when due, and release or foreclose the mortgage as circumstances may require. The power to assign the debt and mortgage is also frequently given, as it may sometimes facilitate the realization of the debt, whilst it can be done without recourse on the original mortgagee, by adding a statement to that effect to the endorsement of the note.

§ 2. All letters or powers of attorney receive a strict interpretation; the authority never being extended beyond that which is given in terms, or is absolutely necessary for carrying the authority into effect.[a]

---

[a] *Paley on Agency*, p. 192, 3d ed. Where a written authority has been recorded, or is otherwise known to exist, or must, by the very nature of the transaction, be presupposed,—as, for instance, in cases affecting real estate, where one person signs by procuration for another,—it is the duty of the

Under sections 27 and 28 of the act of April 16, 1850, concerning conveyances,[a] a power of attorney to release or assign mortgages must be acknowledged and recorded like any other deed whereby real estate is conveyed or affected. Such power of attorney is not deemed to be revoked, by any act of the party by whom it was executed, until the instrument containing such revocation shall be deposited for record in the office in which the instrument containing the power is recorded.

§ 3. The foregoing observations refer to the case where a person, who does not reside in this State, has money invested here in his own name. But a large portion of the capital sent here by non-residents, for investment on mortgage, stands in the name of the person to whose care it is entrusted, who receives for his compensation a share of the interest collected by him, and has to that extent an interest in the investment.

In such case, the latter is the mortgagee, and, as far as any person here is concerned, or has a right to inquire, the sole owner of the mortgage. Acting in his own name, he needs no power of attorney; and, if he be an alien, the remarks which follow, upon the alienage of the mortgagee, and the effect of war upon such alienage, are not applicable to him: for a resident alien mortgagee enjoys, with reference to property, the same rights as a citizen, as will be seen hereafter.

It is usual, when holding mortgages or other property under such circumstances, to make by will the necessary dispositions to protect, in case of death, the rights of interested parties.

ALIENAGE.

§ 4. As the intended mortgagee may be an alien,—that is, a person not a citizen,—it will be useful here to state his rights as such.

---

person dealing with the agent, to make inquiries as to the nature and extent of such authority, and to examine it; and if, from his omission to call for or examine the instrument, he should encounter a loss from the defective authority of the agent, it is properly attributable to his own fault. See *Story on Agency*, pp. 92–95, 4th ed.

[a] *Wood's Digest*, art. 364, 365.

By an act of the legislature, passed April 13, 1850,[a] the common law of England was made "the rule of decision in all the courts of this State, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of California."

§ 5. The common law, intent upon avoiding injury to commerce, the moving power alike of civilization and of the wealth of nations, enables aliens to acquire, hold, and transmit, either to a citizen or to another alien, movable property in like manner as citizens; and they can also bring suits for the recovery and protection of that property.[b]

§ 6. By movable or personal property is understood such objects of property as may attend a man's person wherever he goes, and are such as may be carried from place to place. Money demands necessarily come within this description of property; nor is their character in any manner changed by the fact of their being secured by mortgage on real estate. This principle, as proceeding from the common law, is everywhere recognized, and has received the sanction of the Supreme Court of the United States, which court holds that an alien, whether resident or not, "can take a mortgage as security, and is entitled to have it foreclosed in equity, and the land sold to pay the debt, as the demand is in reality a personal one; the debt being considered as the principal, and the land merely as an incident; and consequently the alienage of the mortgagee, if he be a friend, can, upon no principle of law or equity, be urged against him."[c]

The foreclosure is only one method of collecting the debt, being the appropriate mode of subjecting the security to the payment of the debt.

§ 7. The constitution of this State gives to *bona fide* residents the same rights to the possession of property as enjoyed by citizens, in the following words (art. I. sec. 17): "All aliens or foreigners, who are or who may hereafter become *bona fide* residents of the State of California, may enjoy the

---

[a] *Wood's Digest*, art. 735.

[b] See 2 *Kent's Comment. on American Law*, p. 62. Bradwell v. Weeks, 1 *John. Chan. Rep.* p. 206.

[c] Hughes v. Edwards, 9 *Wheat. Rep.* p. 489; 5 *Cond. Rep.* p. 648.

same rights in respect to the possession, enjoyment, and inheritance of property, as native-born citizens."

The rights of *resident* aliens under the common law are thereby fully confirmed as regards personal property, and considerably extended as to real property.

§ 8. With reference to *non-resident* aliens, whilst, as above shown, they have under the common law the same rights as citizens for acquiring, holding, and transmitting movable property, the right to acquire such property by inheritance has been in part confirmed to them by an act of the Legislature of this State, passed April 19, 1856,[a] which also contains a liberal extension in their favor of the common law principles concerning inheritance of real estate; but as their rights concerning the latter do not affect mortgages, they form no part of the matters under consideration. The act reads as follows:

"Aliens shall hereafter inherit, and hold by inheritance, real and personal estate, in as full a manner as though they were native-born citizens of this or the United States; *provided*, that no non-resident foreigner or foreigners shall hold or enjoy any real estate situated within the limits of the State of California five years after the time such non-resident foreigner or foreigners shall inherit the same; but in case such non-resident foreigner or foreigners do not appear or claim such estate within the period in this section before mentioned, then such estate shall be sold, upon information of the Attorney-General, according to law, and the proceeds deposited in the treasury of said State for the benefit of such non-resident foreigner or foreigners, or their legal representatives, to be paid to them by the Treasurer of said State at any time within five years thereafter, when such non-resident foreigner or foreigners, or their representatives, shall produce evidence, to the satisfaction of the Treasurer and Controller of State, that such foreigner or foreigners are the legal heirs to, and entitled to inherit, such estate, which evidence, together with the joint order of the said Treasurer and Controller, shall be placed on file in the office of the Treasurer, and shall be to him a voucher for any

[a] *Wood's Digest*, art. 2366. See The State of California v. R. C. Rogers, Administrator, April T., 1859.

payments made by him under the provisions of this act; and in the event that such non-resident foreigner or foreigners do not appear or claim said estate or proceeds, and produce said evidence, within said extended term of five years, then said estate or proceeds shall be and become the property of the State, and shall be, by the Treasurer of State, placed to the credit of the school fund."

As above stated, the right to acquire personal property by inheritance has, by this act, been *in part* confirmed to aliens; for the law enables them only to inherit as heirs at law, but not to take by devise or bequest. The latter mode of inheriting personal property is included amongst their rights under the common law, and they do not lose it, though not provided for in this act.

§ 9. Aliens may also be enabled to hold or to inherit property, by the stipulations of treaties[a] between the United States and the respective foreign States, particularly with reference to a confirmation, or modification, of the alien's rights at common law to the acquisition, possession, and transmission of *personal* property; for the United States government does not wish—if, indeed, it has the right—to interfere with the legislation of the various States concerning possession and inheritance of real estate.[b] None of the treaties now in force, however, which have come within my observation, contain more liberal provisions on the subject of personal property than are already secured by the common

---

[a] By art. VI. of the constitution of the United States, treaties, together with the constitution itself, and the laws of the United States made in pursuance thereof, are declared to be the supreme law of the land.

Treaties are to receive an extended and liberal construction, not like the contracts of individuals, where nothing is presumed to be granted but what falls plainly within the words of the grant. University v. Miller, 3 *Dev.* p. 188.

[b] In several treaties, still in force, stipulations have been made in regard to real estate, but the right of the general government to do so has been seriously questioned; and lately, in the consular convention with France, signed at Washington Feb. 23, 1853, the federal government limits itself to confirming the rights granted by the laws of the individual States, so long as such laws shall remain in force, and a promise to *recommend* to such States as do not now give foreigners the right to hold real estate, the passage of laws conferring such rights.

law, and the constitution and laws of this State, quoted above.[a]

§ 10. On the principle that every nation is responsible for the conduct of its citizens towards other nations, and that therefore all questions touching the justice due to foreign nations or people ought to be ascertained by and depend on national authority,[b] an alien has, by the constitution of the United States, the right to sue a citizen in the federal or United States courts. Yet he may sue and be sued in any of the State courts, provided he himself fails to object and ask for a removal to a federal court. It is his right, if he choose to demand it, but not otherwise,[c] to be heard in the federal court, and an alien does not lose this right by residing in the United States.[d]

To entitle the alien to have a suit, commenced against him in a State court, removed to a United States Circuit Court,

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[a] Stipulations, confirming the rights alluded to, are found in treaties made at different times with France, Austria, Prussia, and several other powers.

For instance, with the addition of some directions concerning the recovery of effects, in the treaty concluded at the Hague, October 8, 1782, and which remains in full force, between this country and the States-General of the United Netherlands, art. VI. whereof reads as follows:

"The subjects of the contracting parties may, on one side and on the other, in the respective countries and States, dispose of their effects by testament, donation, or otherwise; and their heirs, subjects of one of the parties, and residing in the country of the other, or elsewhere, shall receive such successions, even *ab intestato*, whether in person or by their attorney or substitute, even although they shall not have obtained letters of naturalization, without having the effect of such commission contested under pretext of any rights or prerogatives of any province, city, or private person; and if the heirs, to whom such successions may have fallen, shall be minors, the tutors or curators, established by the Judge domiciliary of the said minors, may govern, direct, administer, sell, and alienate the effects fallen to the said minors by inheritance, and in general, in relation to the said successions and effects, use all the rights and fulfil all the functions which belong by the disposition of the laws, to guardians, tutors, and curators: *provided, nevertheless*, that this disposition cannot take place but in cases where the testator shall not have named guardians, tutors, or curators, by testament, codicil, or other legal instrument." 8 *U. S. Statutes*, p. 36

[b] Chisholm v. The State of Georgia, 2 *Dall. Rep.* pp. 419, 475, 2 *Cond. Rep.* pp. 635, 671.

[c] Davis v. Packard, 6 *Wendell*, p. 333. Easton v. Rucker, 1 *J. J. Marshall's Rep.* p. 232.

[d] Breedlove v. Nicolet, 7 *Peters' Rep.* p. 413.

upon a petition filed at the time of entering his appearance in such State court, the matter in dispute must exceed the sum or value of five hundred dollars.[a]

§ 11. The constitution of the United States (art. III.) vests the judicial power of the United States in one Supreme Court, and such inferior courts as the Congress may from time to time ordain and establish, and this power extends to all cases, in law and equity, arising under the constitution, the laws of the United States, and treaties made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies between a State, or the citizens thereof, and foreign States, citizens, or subjects; etc.[b]

§ 12. It will be perceived that the power contained in the last mentioned clause does not apply to controversies between two aliens.[c] The citizenship of one party to the suit, and the alienage of the other, must be set forth in the record, in order to authorize the jurisdiction.[d] Nor does the jurisdiction vest where the interest is joint, and two or more persons are concerned in that interest as joint plaintiffs, or joint defendants, who are not each of them competent to sue, or liable to be sued, in the federal courts.[e] These exceptions probably have their origin in the desire of the framers of the constitution to detract as little as possible from the sovereign jurisdiction of the several States, and the fact that, where *both* parties to a suit are aliens, there is no danger of irritation arising from apprehensions of partiality, whilst, where

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[a] *Judiciary Act of* 1789, § 12.

[b] The quotation of this article having been deemed desirable, it is proper to state that it was modified by the following amendment to the constitution, ratified by the States in 1793: "The judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted *against* one of the United States. by citizens of another State, or by citizens or subjects of any foreign State."

[c] Mossman v. Higginson, 4 *Dallas*, p. 12; Course v. Stead, 4 *Dallas*, p. 22; Montalet v. Murray, 4 *Cranch*, p. 46, 2 *Cond. Rep.* p. 19.

[d] Jackson v. Twentyman, 2 *Peters' Sup. C. Rep.* p. 136; Emory v. Greenough, 3 *Dall. Rep.* p. 369. And this must appear by affidavit where a defendant seeks to remove a case from a State court to a United States court. Welch v. Tennent, 4 *Cal. Rep.* p. 203. See, as to the proceedings on removal, Brownell v. Gordon, 1 *McAllister's Rep.* p. 207.

[e] Strawbridge v. Curtiss, 1 *Cranch*, p. 267.

LIBRARY OF THE UNIVERSITY

a citizen and an alien have a joint interest, a serious objection exists to taking the case out of the State courts. The constitution and laws of the United States have been anxious to define by precise boundaries, and preserve with great caution, the line between the judicial authority of the Union and that of the individual States.

§ 13. It has also been decided that an alien cannot sue, in the Circuit Court of the United States, a citizen who is at the time a resident of a foreign country, notwithstanding he has property in the district which might be attached; because, under the act of Congress passed in 1789, commonly called the Judiciary Act, which gives jurisdiction to the Circuit Courts when an alien is a party, no compulsory process lies against a person who is not at the time an inhabitant of, or is not found in, the district in which the process issues. This goes to exclude from the Federal Courts the proceeding by foreign attachment, which may be had under the local laws of the States.[a]

§ 14. The United States courts are bound to take judicial cognizance of the constitution and statutes of the different States;[b] in all actions brought in said courts, the Judiciary Act of 1789 (34th sec.) provides that the laws of the State where the court is held, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the cases where they apply. But in equity proceedings the United States courts are under no such obligation.[c] In cases depending on the laws of a

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[a] Picquet v. Swan, 5 *Mason's Rep.* p. 35; Toland v. Sprague, 12 *Peters' Rep.* p. 300.

[b] Gordon v. Hobart, 2 *Sumner's Rep.* p. 402.

[c] The distinction between the enforcement of legal rights and the pursuit of equitable remedies, which will repeatedly be referred to in these pages, may be thus explained:

The common law of England, derived from remote antiquity, and the force and authority whereof obtains from the universal consent and immemorial usage of the people, is composed of general and unyielding rules, which as society and civilization advanced, became in particular instances oppressive and unjust, according to the enlarged ideas of comparatively modern times.

The Chancellors of England, being in early times churchmen of Rome, applied the humane principles of the civil law of the Roman empire, (as chiefly laid down in the celebrated *Corpus Juris Civilis*,) in which they were

particular State, the construction put upon those laws by the courts of the State will be adopted as far as practicable.[a]

§ 15. From all final judgments rendered in the Circuit Court, in any cases of equity, etc., where the matter in dispute exceeds the sum or value of two thousand dollars, an appeal is allowed to the Supreme Court of the United States.[b]

To the same court an appeal lies, under the twenty-fifth section of the Judiciary Act of 1789, from any final judgment of the Supreme Court of this State, in cases where is drawn in question the validity of a treaty or statute of, or an

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schooled, to modify and ameliorate the harshness and asperities of the common law. This interference occasioned at first, and for a long time, fierce conflicts between the common law and chancery Judges; but the efforts of the Chancellors, assisted by advancing enlightenment, were successful, and resulted in the establishment of certain principles of equity, which, administered concurrently with the common law, have for centuries formed a harmonious system of law, without conflict of jurisdiction or process between the two courts.

The nature of equity cannot be better expressed than in the words of Aristotle, who defines it to be: the correction of the law wherein it is defective by reason of its universality; a definition adopted by Grotius and other eminent authors.

Courts of common law give a general judgment for or against defendant; but they have no method of proceeding by which the proper remedy can be administered, to the full extent of the relative rights of the parties, in cases where a simple judgment for either party will not do entire justice between them, and where some modification of their rights, or some peculiar adjustment, either present or future, temporary or perpetual, is required. In all such cases, where a plain, adequate, and complete remedy cannot be had in common law courts, equity will claim jurisdiction and give relief. In some instances, courts of equity are distinct from those of law; in others, the same tribunals exercise the jurisdiction of both courts, though their forms of proceedings are different in their two capacities.

In suits founded upon mortgages, justice would generally not be fully administered by a decision only founded upon common law principles, and they are therefore brought in courts having equity jurisdiction. Considering the vast benefits derived from the application of equitable principles in the judicial settlement of such suits, it may well be said, in the language of Chancellor Kent, that "the case of mortgages is one of the most splendid instances, in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the Courts of law."

[a] Shelby v. Guy, 11 *Wheaton's Rep.* p. 361, 6 *Cond. Rep.* p. 345; Jackson v. Chew, 12 *Wheat. Rep.* p. 153, 6 *Cond. Rep.* p. 489.

[b] Act of Congress, March 3, 1803, § 2.

authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party under such clause, or commission.[a]

EFFECT OF WAR.

§ 16. In considering the restrictions to which the rights of aliens are subject during war, it will not be necessary to refer to such aliens as are, on the breaking out of war, *bona fide* residents of California, the same rights in respect to the possession, enjoyment, and inheritance of property, as are held by native-born citizens, being guaranteed to them by the constitution of this State.[b]

The following observations, therefore, relate exclusively to the position of a *non-resident* alien—or alien enemy, as he is then styled—during the existence of a war between the United States and his country.

§ 17. The property of an enemy, in general,[c] is liable to seizure and confiscation as prize of war, but only during the war. For the sound rule of international law is, that war *suspends*, but does not *annul*, obligations contracted between individuals of different countries before its existence; and, unless there is some legal declaration of the forfeiture, the right of the owner revives, and he may enforce it, on the return of peace.[d] This, Lord Stowell observes, is an ac-

[a] This section of the Judiciary Act establishes a mode of final adjudication of the questions arising under it, by which uniformity of interpretation throughout the United States is insured. Its constitutionality, which has sometimes been questioned, has been acknowledged by the highest tribunal of this State, in the case of Ferris v. Coover, 11 *Cal. Rep.* p. 175.

[b] See *ante*, § 7.

[c] Immovable property is never confiscated, but its rents and profits may be sequestrated. *Bynkershoeck. Quæst. Jur. Publ.* lib. i. cap. 7; *Vattel, Droit des Gens*, liv. iii. ch. 5, § 76; 3 *Phillimore, Comment. upon Intern. Law*, p. 135.

[d] 3 *Phillimore, Intern. Law*, pp. 734, 735; The Adventure, 1 *Wheat.* p. 128, note.

knowledged principle of the common law of England, which it has borrowed from the stores of international jurisprudence.[a]

§ 18. But there is a great diversity of opinions,[b] as to whether property belonging to him, including debts due to him, by mortgage or otherwise, and found within the territory of the belligerent State at the commencement of hostilities, is liable to the same fate with his other property wheresoever situated; and the tendency of modern usage between nations seems to be, to exempt such property from the operations of war.

The late Henry Wheaton, in his Elements of International Law,—after stating[c] that Grotius, whose great work on the laws of war and peace appeared in 1625, considered the right to demand debts, due to private persons, as suspended only during war, and reviving with the peace,—examines the principles laid down by Bynkershoeck, who wrote in 1737, Vattel,[d] and the later authors on the law of nations, and concludes as follows: "It appears, then, to be the modern rule of international usage, that property of the enemy, found within the territory of the belligerent State, or debts due to his subjects by the government or individuals, at the commencement of hostilities, are not liable to be seized and confiscated as prize of war. This rule is frequently enforced by treaty stipulations; but, unless it be thus enforced, it cannot be considered as an inflexible, though an established

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[a] Nuestra Señora de los Dolores, 1 *Edwards' Adm. Rep.* p. 60.

[b] *Wheaton, Intern. Law*, part IV. ch. 1, § 9.

[c] *Ibid.*; Clarke v. Morey, 10 *John. Rep.* p. 68.

[d] Vattel, writing about the year 1757, says, when speaking of the right of seizure and confiscation, that "the sovereign has naturally the same right over what his subjects may be indebted to the enemy; therefore, he may confiscate debts of this nature, if the term of payment happen in time of war, or at least he may prohibit his subjects from paying while the war continues. But, at present, the advantage and safety of commerce have induced all the sovereigns of Europe to relax from this rigor. And as this custom has been generally received, he who should act contrary to it would violate the public faith; for strangers trusted his subjects only from a firm persuasion that the general custom would be observed. The State does not so much as touch the sums which it owes to the enemy: money lent to the public is everywhere exempt from confiscation and seizure in case of war." *Vattel*, liv. iii. ch. 5, § 77.

rule. 'The rule,' as it has been beautifully observed, 'like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign,—it is a guide which he follows or abandons at his will; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.'"[a]

§ 19. In the decision from which the latter quotation is taken,[b] the United States Supreme Court further held, that "it was not an immutable rule of law, but depended on political considerations, which might continually vary. Commercial nations, in the situation of the United States, had always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy's property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens."[c] "The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but that it simply confers the right of confiscation." . . . "Between debts contracted under the faith of laws, and property acquired on the faith of the same laws, reason draws no distinction; and it is not believed that modern usage would sanction the seizure and confiscation of the goods of an enemy on land, which were acquired in peace in the course of trade."[d]

§ 20. And it was decided, in the case alluded to, that such confiscation was not a necessary consequence of a declaration

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[a] *Wheaton, Intern. Law*, part iv. ch. 1, § 9.

[b] *Mr. Chief Justice Marshall*, in Brown v. The United States, 8 *Cranch's Rep.* p. 110; 3 *Cond. Rep.* p. 136.

[c] The principle of reciprocity operates in many cases of international law. The conduct of the enemy may be a consideration for retaliation, as the fear of reprisals may restrain the taking of extreme measures.

[d] Kent in commenting upon this decision of the Supreme Court, says that, as it is asserted by its authority. this right is contrary to universal practice, and it may therefore well be considered as a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times. 1 *Kent's Comm.* p. 73, 8th ed.

of war,[a] and that, in this country, owing to the distribution of powers under the constitution, proceedings to condemn the property of an enemy, found within our territory at the declaration of war, could be sustained only upon the principle that they were instituted in execution of some existing law. Hence, to render effective the belligerent right to seize enemy's property found in the United States at the commencement of the war, an express act of Congress, which had never been passed, was requisite.

Nor has any such law been passed by Congress since that decision was rendered.

§ 21. Treaties often provide against the confiscation of property of the enemy, found within the territory of the belligerent State, or debts due to his subjects by the government or individuals, at the commencement of hostilities, by fixing a certain period within which such property may be removed, debts recovered, and real estate realized. Stipulations of this nature are contained in treaties of the United States with the Netherlands,[b] Sweden, Venezuela, Mexico, and other States.

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[a] The English Court of King's Bench went even further. When, in 1807, the Danish government issued an ordinance, retaliating the seizure of Danish ships and other property by Great Britain, by sequestrating all debts due from Danish to British subjects, the court determined that such sequestration was not conformable to the usage of nations; the text writers having condemned the practice, and no instance having occurred of the exercise of the right, except the ordinance in question, for upwards of a century. *Wheaton, Intern Law*, part IV. ch. 1, § 12. It appears that no similar confiscation has since then been attempted.

[b] Art. XVIII. of the treaty of 1782 with the Netherlands, reads as follows: "For the better promoting of commerce on both sides, it is agreed, that if a war should break out between their High Mightinesses the States-General of the United Netherlands and the United States of America, there shall always be granted, to the subjects on each side, the term of nine months after the date of the rupture, or the proclamation of war, to the end that they may retire, with their effects, and transport them where they please, which it shall be lawful for them to do, as well as to sell or transport their effects and goods, in all freedom and without any hindrance, and without being able to proceed, during the said term of nine months, to any arrest of their effects, much less of their persons; on the contrary, there shall be given them, for their vessels and their effects, which they would carry away, passports and safe conducts for the nearest ports of their respective countries, and for the time necessary for the voyage. And no prize made at sea shall be adjudged lawful, at least, if the declaration of war was not or could not

The article containing a similar provision, and other stipulations with reference to a state of war, in the treaty of Guadalupe Hidalgo with the latter power, closes with the declaration, which may be considered as embodying the universally adopted principle, as to the efficacy of treaty stipulations made with a view to the possibility of war,[a] that "no pretence that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending the solemn covenant contained in this article. On the contrary, the state of war is precisely that for which it is provided, and during which its stipulations are to be as sacredly observed as the most acknowledged obligations under the laws of nature or nations."

In some treaties, the contracting powers have not only granted time for the recovery of debts in case of war, but have also agreed, that neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor moneys, which they may have in the public funds, or in the public or private banks, shall ever, in any event of war or national differences, be sequestrated or confiscated.

This has, for instance, been done in the treaty concluded in 1794, between the United States and Great Britain, (art.

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be known, in the last port which the vessel taken has quitted; but, for whatever may have been taken from the subjects and inhabitants of either party, and for the offences which may have been given them, in the interval of said terms, a complete satisfaction shall be given them." 8 *U. S. Statutes*, p. 42.

The terms hereby granted to the subjects on each side, to sell or transport their goods in all freedom and without hindrance, will enable them to collect a debt secured by mortgage, or to sell the mortgage, as circumstances may require, and to transport the proceeds.

[a] Wheaton says, speaking of such stipulations as are made expressly with a view to a rupture, that there can be no doubt but they would not be impaired by a supervening war, being the very contingency meant to be provided for, and that they must remain in full force until rescinded by mutual agreement. *Wheat. Intern. Law*, part iii. ch. 2, § 10. See *Vattel*, liv. iii. ch. 10, § 175; 1 *Kent's Comm.* p. 179, 8th ed. The latter says: "The faith of promises and treaties, which have reference to a state of war, is to be held as sacred in war as in peace, and among enemies as among friends." "There can be no doubt that the obligation of the tenth article of the treaty of 1794 with Great Britain, providing that debts shall not be confiscated, was not impaired by the war of 1812, but remained throughout that war, and continues to this day, binding upon the two nations, and will continue so until they mutually agree to rescind the article."

10,) and in the more recent treaties of this country with Ecuador, with Venezuela, and other States. The treaty with Great Britain contained an express declaration that "it was unjust and impolitic that debts and engagements, contracted and made by individuals, having confidence in each other and in their respective governments, should ever be destroyed or impaired by national authority on account of national differences and discontents."[a]

§ 22. It is an universal rule, that, during war, an alien enemy cannot make valid contracts; he could not, therefore, take mortgages. Every species of contract, made without express permission of the government, during the continuance of the war, with the subjects of the public enemy, is utterly void.[b]

§ 23. As a general rule, aliens who are *bona fide* residents may sue and be sued during a war between their country and the United States; and in this State they have the undoubted *right* so to do, by virtue of the constitutional provision before alluded to. But *non-resident* aliens cannot in such event sustain a suit in the courts of the United States,[c] either federal or State, neither in their own names nor in the name of a trustee who is not an alien.[d] Nor can a neutral, or a citizen of the United States, who is domiciled in the enemy's country; for, not only in respect to his property, but also as to his capacity to sue, he is deemed as much an alien enemy as a person actually born under the allegiance, and residing under the dominion, of the hostile nation.[e]

The enemy has no *persona standi in judicio* in the country of the adverse belligerent,[f] unless he have a safe conduct, which *pro tanto* relieves him from the disability incident to his character; or he may be permitted by a special license

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[a] 8 *U. S. Statutes*, p. 122.

[b] 1 *Kent's Comm.* p. 76, 8th ed. Contracts by prisoners of war for necessaries, and for ransom, constitute an exception.

[c] Mumford v. Mumford, 1 *Gallis. Rep.* p. 366; Bell v. Chapman, 10 *Johns. Rep.* p. 183.

[d] Crawford et al. v. The William Penn, 1 *Peters' C. C. Rep.* p. 106. But it is no valid objection, *after the war*, that the suit was brought by plaintiff as trustee for an alien enemy. Hamersly v. Lambert, 2 *John. Ch. Rep.* p. 508.

[e] The Society, etc. v. Wheeler et al., 2 *Gallis. Rep.* p. 105.

[f] *Bynkershoeck, Quæst. Jur. Publ.* lib. i. cap. 7.

to sue or be sued.[a] As, for instance, by virtue of treaty stipulations. In the United States, where the plaintiff came to reside before the war, the license has been deemed to be implied by law and the usage of nations; and if he came there since the war commenced, a license has likewise been held to be implied, and the protection to continue until the executive shall think proper to order the plaintiff out of the United States.[b]

But these are exceptions; in general, his civil right to sue is suspended during war.

§ 24. The defence of alien enemy, however,—that is, the denial of his right to be heard as plaintiff in courts of justice,—is by no means favored in the law, and some modern cases have gone a great way in discountenancing it.[c] One reason is given by Stephen, who mentions the plea of alien enemy as one of the pleas "which are regarded unfavorably by the courts, as having the effect of excluding the truth."[d] Another reason will be the unmistakable tendency of modern and more enlightened times, to soften the rigors of a state of war, as bearing upon commerce, and upon unoffending inhabitants of the belligerent countries.[e]

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[a] See Johnson v. Goods, 2 *Paine's C. C. Rep.* p. 639; 3 *Phillimore, Intern. Law*, p. 115.

[b] Clarke v. Morey, 10 *John. Rep.* p. 70.

[c] The Society, etc. v. Wheeler et al., 2 *Gallis. Rep.* p. 105.

[d] *Stephen on Pleading*, p. 353, 5th ed.

[e] The following are instances where, under a liberal construction, this plea was set aside:

A plea of alien enemy should be rejected on motion, if the nation in which the plaintiff is alleged to be resident be at peace with ours. Treaties with foreign nations being part of the law of the land, of which the courts are bound to take notice. Baby v. Dubois, 1 *Blackf.* p. 255.

The plea of alien enemy is one which the courts discourage, and against which they will make every intendment. The defendant was put under terms to plead issuably by an order of the 23d March. On the 28th, war was declared against Russia. On the 29th, the defendant took out a summons before a judge for leave to plead a plea of alien enemy, which was dismissed. On application to the court, it refused a rule *nisi* for leave to plead the plea. (This was an action brought in the Court of Common Pleas, the plaintiff being at the time an alien friend, upon a contract for the sale of timber at Riga.) Shepeler v. Durant, 25 *Eng. Law and Eq. Rep.* p. 334.

In the case, The Society for the Propagation of the Gospel (England) v. Wheeler et al., 2 *Gallison's Rep.* p. 105, the learned Justice Story ob-

§ 25. The disability to sue is but temporary in its nature, for a state of perpetual war is not to be presumed; and while all rights of non-resident aliens are suspended during war with their respective countries, yet those existing at the commencement of the war are not extinguished, but revive in their full force on the return of peace.[a] Debts, for instance, not actually confiscated, are judicially considered as revived, together with the right to sue for their recovery, on the restoration of peace between the two countries.[b] So may an alien enemy take property by succession as next of kin, though he cannot recover it during war;[c] it remains in the hands of the administrator in trust for him until the return of peace. It has also been adjudged that a bequest to an alien enemy was good, and, after a peace, might be enforced.[d]

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serves: "The suit was commenced in a time of peace, and every presumption, which can, ought to be made to support it. It is sufficient, however, that, by possibility, the demandants, in their corporate capacity, and the capacity of their members, may have a *persona standi in judicio*, to entitle them to judgment. There is another consideration, also, which may properly weigh in this case. The suit was commenced during peace, and, on the declaration of war, it was competent for the defendants to plead the hostile alienage of the demandants, if it existed, in bar to the further prosecution of the suit. They did not so plead, and thereby have affirmed the ability of the demandants to prosecute the suit to judgment. Upon this ground, where the disability of alien enemy occurred before judgment, and on a *scire facias* on the judgment the disability was pleaded, the plea has been held bad in West v. Sutton, 2 *Lord Raymond's Rep.* p. 853."

In the case of Buckley v. Lyttle, where the plaintiff became an enemy after judgment, the court refused to stay or set aside execution. 10 *Johns. Rep.* p. 117.

When an alien obtains judgment, on which a writ of error is brought, and war occurs pending such writ, judgment will nevertheless be affirmed. Owens v. Hanney, 9 *Cranch*, p. 180.

It is by some supposed that, where a covenant had been entered into by a mortgagor in time of peace, not to plead in the event of war the plea of *alien enemy* in bar of any action on the debt or mortgage, such plea would not be allowed in our courts.

[a] Bell v. Chapman, 10 *Johns. Rep.* p. 183.

[b] *Wheaton, Intern. Law*, p. 379, 6th ed.

[c] See Bradwell v. Meeks, 1 *Johns. Chan. Rep.* p. 206, as far as personal property is concerned. In California, the same rule will apply to all other property, in virtue and under the restrictions of the act of 19th April, 1856, already quoted, § 8.

[d] Attorney-General v. Wheeden et al., *Parker's Rep.* p. 267.

§ 26. To maintain and to give full force to the principle that an alien enemy's rights are only *suspended* during a war between the United States and his country, and revive at its expiration, the statute of limitations of this State (sec. 25) provides, that, " in cases where an action may only be brought within a limited term after the cause of action shall have accrued, and a person shall be an alien subject, or citizen, of a country at war with the United States, the time of the continuance of the war shall not be part of the period limited for the commencement of the action."

CHAPTER II.

TITLE. — RECORD. — SEARCH OF TITLE. — ACKNOWLEDGMENT OR PROOF.

TITLE.

§ 27. It is a fundamental principle in English, as well as in Spanish law, derived from the maxims of the feudal tenures, that the king was the original proprietor of all land in the kingdom, as well as of all territories acquired, like California, by discovery and colonization, and that he was the only and true source of title.[a] In the United States of America the same principle has been adopted, and all valid individual title to land in California is therefore derived from the government of the United States[b] and the State of California, (from the latter only for land covered by tide-water,) or from the Spanish Crown, prior to the 28th day of September, 1821, the day recognized in law as the date of the independence of the Mexican nation; and from the government of Mexico up to the 7th July, 1846, when the United States took possession of this State, which was subsequently ceded to them by the treaty of Guadalupe Hidalgo, Feb. 2d, 1848.

§ 28. Many large grants of land were obtained from the Spanish and Mexican governments; and inasmuch as California was, up to the time of its cession to the United States, merely a vast herding-ground, with hides, horns, and tallow for its main exports, and pasturage the only purpose for which land was required, the boundaries in some grants are found to be described in a very indefinite manner; in others, the quantity said to be contained within certain boundaries

[a] See *Kent's Comm.* p. 377.

[b] By the act for the admission of the State of California into the Union, the title of the United States to, and the right of the federal government to dispose of, the public land within its limits, have been expressly reserved.

is incorrect, or conditions therein made were not complied with, etc.

Some grants were made to cities or towns, and the power to grant lands deputized to its authorities. So was the Ayuntamiento, or Town Council, of the pueblo or town of San Francisco, by a territorial act of 22d November, 1835, authorized to grant land within its limits, but not exceeding 100 varas (275 feet) square in any one lot, and the lots not to be located within two hundred varas of the beach. The Alcalde was vested with the chief authority, and made such grants as the executive officer of the Ayuntamiento. And by instructions from the territorial government, of April 23d, 1841, Justices of the Peace in San Francisco were authorized to grant lots of 50 varas (137½ feet) square, but no more.

The better opinion now is, that the towns did not *own* the lands, but only acted as donees of a power to grant, and, as such, conveyed an absolute title in fee simple. The holders, however, of titles obtained by purchase under execution against the city, under early judgments in favor of Peter Smith, and others, assume the ownership to have been in the pueblos, and mainly upon this question, which has not yet been finally decided, rests their title to considerable property in the city of San Francisco.

§ 29. In order to determine and define all rights claimed by virtue of any right or title derived from the Spanish or Mexican governments, Congress passed, March 3d, 1851,[a] an act to ascertain and settle the private land claims in the State of California. This was the more necessary, as the sudden and large immigration, consequent upon the gold discoveries in 1848, and the enormous rise in the value of land which naturally followed, made it probable, and it was by subsequent experience demonstrated, that dishonest persons would claim property by means of fraudulent documents.[b] By this act a Land Commission was instituted, before

[a] *Wood's Digest*, appendix, p. 751.

[b] Several claims based on such documents have been presented, some of which have been rejected for this reason, whilst the vigorous opposition to them has led to the abandonment of others by the claimants thereto. One or two, which are supposed to be of that nature, are still on appeal before

which every claimant, (including cities, towns, etc., for lands originally granted to them,) under Spanish or Mexican titles, was enabled to present the same. Upon the evidence, documentary and otherwise, produced by the claimant, or on behalf of the United States by their own duly appointed agents, the commissioners decided upon the validity of the claim, as against the United States. From their decision appeal could be taken to the United States courts.

All lands to which no claim was made within two years after the date of the act, or to which the claims were presented, but finally rejected, are deemed public domain. That is, under this act; for, on general principles of law, and under the treaty of Guadalupe Hidalgo, a title perfect in itself under the Mexican government, about which, or its conditions or boundaries, the holder has nothing to ask of, and no equity to press upon, the United States government, must be respected, independent of any action under the act referred to.

All valid grants, however, without any exception, are believed to have been submitted to the Board of Land Commissioners, every owner having been desirous of obtaining its confirmation by the Board, for the better settlement of the title.

§ 30. The Land Commissioners closed their labors in March, 1856, and the time limited for appeals from their decisions has since expired; but some of the cases in which their decisions were appealed from are still before the United States courts.

For all claims finally confirmed a patent issues to the claimant, which is conclusive between the United States and the claimant, and between persons holding under either of those parties. The patent takes effect by relation at the date of the presentation of the claimant's petition to the Land Commissioners, and it may be resisted by third persons only on showing that it conflicts with prior and superior rights vested in them.[a] Such resistance will hardly ever

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the Supreme Court of the United States. The principal claim based upon fraudulent documents was that of Jose Y. Limantour, who on that account now lies under an indictment for forgery; the opinion of the court rejecting the same, as rendered by Judge Hoffman, is elaborate and very interesting.

[a] Moore v. Wilkinson, April T. 1859.

occur; for where there was more than one claimant to a grant before the Board or on appeal, every one has been allowed to plead his rights, and has, as far as known, been anxious to avail himself of the opportunity; and as the right of each party laying claim to property has been subjected to a close scrutiny, the patent may, in general, be considered to have forever settled the title to the property it affects.

§ 31. In the mean time, Congress provided, by act of 3d March, 1853,[a] for the survey of the public and of other lands in California,[b] and directed that the public lands should be subject to the pre-emption laws passed by Congress Sept. 4, 1841,[c] and should be offered for sale under certain regulations, with the exception of the sixteenth and thirty-sixth sections of each township, (or, in certain cases, other public lands to be selected by the State instead,) which were granted to the State for public schools. Congress granted, by the same act, to the State of California, two entire townships for the use of a seminary of learning, and ten sections for the erection of public buildings.

§ 32. The act of Sept. 4, 1841,[d] above mentioned, granting pre-emption rights, states the manner in which the head of a family, a widow, or a single man over twenty-one years, being a citizen of the United States, or having declared his intention to become such, may purchase land, not to exceed a quarter section, at the minimum government price, after having made a settlement upon it. Such land is to be entered with the Register of the land office for the district in which it lies.

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[a] *Wood's Digest*, appendix, p. 748. See, for an extension of the pre-emption privilege in California, act of March 3, 1854, *Ibid.* p. 751.

[b] By the surveys of the federal government, the country is divided by meridians, six miles distant from each other, and crossed by east and west lines also at intervals of six miles, into townships of six miles square, and each of these again in thirty-six sections, containing each one square mile, or 640 acres. An acre contains 160 square rods or perches, or 4,840 square yards. For the survey, a chain is used, four rods or sixty-six feet in length, and consisting of one hundred links.

[c] *Wood's Digest*, appendix, pp. 744, 746.

[d] *Wood's Digest*, appendix, p. 746. See also acts of Congress of March 3, 1853, *Ibid.* p. 750; March 3, 1854, *Ibid.* p. 751; August 4, 1854, *Ibid.* p. 747.

By the same act, five hundred thousand acres were granted to each State then existing, or thereafter to be admitted, for purposes of internal improvements; viz., roads, canals, etc., as in said act enumerated.

§ 33. The constitution of the State of California, art. IX. sec. 2, appropriates this grant to the support of the common schools; and this change of object obtained the sanction of Congress by its admission of the State of California into the Union, September 9, 1850, with this appropriation engrafted upon her constitution.

The State, by an act of May 3, 1852,[a] provided for the sale of warrants for these five hundred thousand acres, at two dollars per acre, and authorized the purchasers to locate the warrants upon any vacant and unappropriated lands belonging to the United States, and subject to such location, which was further provided for by act of April 30, 1857.

By an act on the same subject, passed by the Legislature April 23, 1858, and by its amendments of Feb. 18 and March 16, 1859, the price was lowered to one dollar and twenty-five cents per acre, with interest at ten per cent. per annum from the date of location, payable as therein stated; the manner of locating in a United States land office was prescribed, and the sale in like manner authorized, of the two townships for a seminary of learning, and the ten sections for public buildings, granted by the act of 1853, above mentioned. The proceeds of the school lands, seminary lands, and public building lands, to constitute separate funds for the furtherance of their specific objects.

§ 34. Congress has also granted to the several States, by act of Sept. 28, 1850,[b] and the confirmatory act of March 3, 1857,[c] the swamp and overflowed lands within their limits; and the manner in which the State of California is willing to dispose of these lands, at the rate of one dollar per acre, has been regulated by acts of her Legislature, of April 28, 1855;[d] March 13, 1858; April 21, 1858; and April 18, 1859.

§ 35. The title to water lots, however, or property lying

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[a] *Wood's Digest*, art. 2710 et seq.
[b] *Ibid.* appendix, p. 745.
[c] *Ibid.*
[d] *Ibid.* art. 2721 et seq.

between high-water mark and ship-channel, if not alienated before the admission of the State of California into the Union, must be derived from the State; for the eminent domain over the shores of navigable waters and the soils under them belongs to the respective States, as an incident of State sovereignty. This right of sovereignty passed from Mexico to the United States, and, on the admission of California into the confederacy, the title passed to the State;[a] and although her ownership is attributed to her for the purpose of preserving the public easement, or right of navigation, it has been decided that she may exercise her power, in certain cases, to destroy the easement, in order to subserve the general good, which, when done, subjects the land to private proprietorship.[b] The exercise of the right of the State in this respect is only qualified by, and therefore must not conflict with, the right to regulate commerce, surrendered by her to the United States when she came into the Union.[c]

§ 36. The State granted, by act of March 26, 1851,[d] the use and occupancy of the most valuable portion of the beach and water property on the water front of the city of San Francisco to said city, for the term of ninety-nine years, and provided, by act of May 18, 1853,[e] for the sale of the remaining interest of the State in the property.

Under an erroneous impression as to her rights in the premises, the city had already disposed of nearly all of this property, mostly by a sale at auction in January, 1850. The legislative grant of 1851, which also recognized the plan of the city as extended into the water,[f] enured by its terms immediately to the benefit of the *bona fide* purchasers, prior to April 3, 1850, from the city, who were afterwards, by the

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[a] See Pollard's Lessee v. Hagan et al., 3 *Howard's S. C. Rep.* p. 212.

[b] Eldridge v. Crowell, 4 *Cal. Rep.* p. 80.

[c] Griffing v. Gibb & Frazer, 1 *McAllister's Rep.* p. 224. In a case where land covered by tide-water had been reclaimed, it was decided that, where the easement has been destroyed, the right of the State ceases, except to prosecute for perpresture, and have the easement restored. Guy v. Hermance, 5 *Cal. Rep.* p. 73.

[d] *Wood's Digest*, art. 2728 et seq.

[e] *Ibid.* art. 2732 et seq.

[f] Eldridge v. Crowell, 4 *Cal. Rep.* p. 80.

above mentioned act of 1853, enabled to buy for a small sum the reversionary interest of the State, thereby completing their title.

§ 37. By act of Congress, passed March 3, 1855,[a] a bounty of one quarter section was granted to every person who has served with the army or navy of the United States in time of war, the warrants issued to be located as therein stipulated. Many grants have been made under previous acts for the same purpose, but these acts, not being so comprehensive in their nature, are not here specially referred to.

§ 38. Every title to land in California has its origin either in a Spanish or Mexican grant, in one of the acts of Congress above referred to, (§§ 31–34, 37,) or some special authority granted by Congress; or, in the case of property lying between high-water mark and ship-channel, (see §§ 35, 36,) in a grant or sale by the owner of the right of sovereignty at the time of such grant or sale.

RECORD.

§ 39. The system of record or registration, as existing in California in virtue of an act concerning conveyances, passed April 16, 1850, and amended April 27, 1855,[b] affords great security for land titles. In order fully to realize its benefits, all instruments affecting real estate should be recorded without delay. Amongst its provisions are the following:

"Sec. 24. Every conveyance of real estate, and every instrument of writing, setting forth an agreement to convey any real estate, or whereby any real estate may be affected, proved, acknowledged, and certified, in the manner prescribed in this act, to operate as notice to third persons, shall be recorded in the office of the Recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto, without such record."

"Sec. 25. Every such conveyance or instrument of writing, acknowledged or proved and certified, and recorded in the manner prescribed in this act, shall, from the time of filing

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[a] *Wood's Digest*, appendix, p. 754.

[b] *Ibid.*, art. 338, et seq.

the same with the Recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice."

§ 40. "Sec. 26. Every conveyance of real estate within this State, hereafter made, which shall not be recorded as provided in this act, shall be void as against any subsequent purchaser, in good faith, and for a valuable consideration, of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded."

§ 41. The principal object of laws, which require deeds and mortgages to be recorded, is to prevent imposition upon subsequent purchasers and mortgagees in good faith, and without notice of the prior deed or incumbrance, but not to protect them when they have such notice.[a] That is, an unrecorded instrument, if duly executed, and when executed by a married woman, also, duly acknowledged, is valid against a subsequent purchaser or mortgagee, who had in any manner actual notice of its existence. And the open, notorious possession of real estate, by one having an unrecorded deed for it, (but only where he is himself in possession, not if a tenant has possession,[b]) has been held[c] to constitute evidence of notice to a subsequent purchaser of the first vendee's title, where such possession existed at the time of the acquisition of the title or deed of the subsequent vendee from the common vendor.

§ 42. The conveyancing act further provides:

"Sec. 33. If any person shall convey any real estate, by conveyance purporting to convey the same in fee simple absolute,[d] and shall not at the time of such conveyance

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[a] Woodworth v. Guzman, 1 *Cal. Rep.* p. 203.

[b] Smith v. Dall, April T. 1859.

[c] Hunter v. Watson et al., 12 *Cal. Rep.* p. 363. In this case the holder of the unrecorded deed had been in open and notorious possession during five years previous to the creation of the subsequent title, and the subsequent purchaser appears to have been aware of it.

[d] The terms "fee simple absolute" are used to denote an estate of inheritance conveyed or mortgaged. The word "absolute" adds nothing to the force of the preceding terms "fee simple," which of themselves express the highest interest one can possess in land. Clarke v. Baker et al., January T., 1860.

have the legal estate in such real estate, but shall afterward acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance."

§ 43. The effect of the provisions of the foregoing section upon a conveyance of premises in fee, is the same as if it were written upon its face that the grantor conveyed all the estate which he then possessed, or which he might at any time thereafter acquire. The section applies to mortgages as well, and as fully, as to conveyances absolute in their form. Whatever in the instrument, treating it as a conveyance, would operate to transfer a subsequently acquired title to the grantee, must equally operate, treating the instrument as a lien or incumbrance, to subject such acquired interest to the purposes of the original security.[a]

The thirty-sixth section of the same statute expressly provides, that "the term 'conveyance,' as used in this act, shall be construed to embrace every instrument in writing by which any real estate or interest in real estate is created, aliened, *mortgaged*, or assigned, except wills, leases for a term not exceeding one year, executory contracts for the sale or purchase of lands, and powers of attorney." The terms "mortgage" and "to mortgage" have but to be substituted for their corresponding words in the thirty-third section, to find its application to mortgages.[b]

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[a] Clarke v. Boyreau et al., January T. 1860.

[b] Clarke v. Baker et al., January T. 1860. "There is another consideration growing out of the nature of the contract of mortgage, which must lead practically to the same result. The mortgagor is to return to the mortgagee the money and interest secured; until this is consummated, the obligation rests upon the mortgagor to do nothing which can impair the rights of the mortgagee, or embarrass their enforcement. The relation between the mortgagor and mortgagee is one which requires the former to preserve the property for the purposes of the security for which it was pledged; and hence, to insure good faith and fair dealing, he is forever precluded from denying the existence of the lien which he has created, or attempting to defeat its enforcement against the property upon which it was placed. Equity will not suffer the mortgagor, in violation of good faith, by any act to impair or destroy the security. Any claim or outstanding title he may have purchased only went to strengthen his own title to the premises, and hence, through him, to give possibly greater value to the security." Supreme Court, ibid.

§ 44. The act also provides, that, when a conveyance or instrument, conveying or affecting real estate, is acknowledged or proved, certified, and recorded, as prescribed, "and it shall be shown to the court that such conveyance or instrument is lost, or not within the power of the party wishing to use the same, the record thereof, or the transcript of such record, certified by the Recorder under the seal of his office, may be read in evidence without further proof." (Sec. 30.) It may be rebutted, but then the burden of proof will rest on the party opposing.

In the above case, however, any other competent evidence is equally admissible.

§ 45. Before entering upon the duties of their offices, the Recorders take the constitutional oath of office, and enter into bonds in sums varying in different counties, with two or more sufficient sureties, conditioned for the faithful performance of their duties as Recorders.

It is by law made the duty of the Recorders to make searches for conveyances, mortgages, and all other instruments or papers recorded or filed in their respective offices, and to furnish a certificate thereof.

SEARCH OF TITLE.

§ 46. Yet, though a much heavier expense is incurred, particularly when sent into another county, a Searcher of Records is usually employed in preference to a Recorder, (whose other duties besides, might often cause delay,) for the investigation of titles, on account of personal confidence in the ability and integrity of the Searcher, and his experience in such matters, which causes him to be very familiar with the details of a search. In fact, the business of searching records, on account of its importance for all transactions in real estate, and the vast amount of time involved, has grown to be a profession. The Searcher has to examine the records of the county in which the land is situated, and of any other county whereof such county may formerly have constituted a portion, or under which the land may formerly have belonged, and to prepare from such records an abstract, show-

ing all changes of ownership from the origin of the title down to the present claimant, and containing all grants, patents, deeds, conveyances, mortgages, leases, attachments, liens, judgments, street assessments, etc., which may affect the property.[a] For judgments he will also have to examine the judgment dockets of the courts, and, for tax sales and unpaid taxes, the books in the Tax Collector's office. This laborious work is performed with great care, the reputation and consequently the business of the Searcher depending on his accuracy.

This abstract is then submitted to an attorney or counsellor at law, to further determine the validity of the title of the mortgagor to the property offered as security, upon its legal merits, under the laws of the land, and the construction put upon them by the courts.

ACKNOWLEDGMENT OR PROOF.

With reference to the acknowledgment or proof of conveyances, the conveyancing act provides, in general:[b]

§ 47. "Sec. 3. Every conveyance in writing, whereby

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[a] Liens cannot be enforced unless action on the same be brought within certain periods of time, as in various cases by statute provided.

[b] With reference to our system of conveyancing, the greatest attention should be given to an exact compliance with the provisions of our legislative acts, though there are decisions of our courts which have given a liberal construction to these laws. Most of the embarrassments ordinarily occurring are the result of deviations, in apparently unimportant particulars, from the positive provisions of the acts governing conveyances of real estate. Informal certificates of acknowledgment, as well of documents executed at home, as of deeds, powers of attorney, etc, coming from the Eastern States or Europe, have often delayed the recovery of funds, or have led to the rejection of titles.

It has therefore been considered useful to insert here approved forms for the cases most generally occurring:

Certificate of Acknowledgment (*see* §§ 47–49, 51, 53).

STATE OF ..... } ss.
COUNTY OF ..... }

On this ..... day of ..... A. D. One Thousand Eight Hundred and ..... before me, ... a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared the within named ..... whose name is subscribed to the foregoing (*or* annexed, *as the case may be*) instrument, as a

any real estate is conveyed or may be affected, shall be acknowledged or proved and certified in the manner hereinafter provided."

"Sec. 5. Every officer that shall take the proof or acknowledgment of any conveyance affecting any real estate shall grant a certificate thereof, and cause such certificate to be endorsed or annexed to such conveyance; such certificate shall be,

1. When granted by any Judge or Clerk, under the hand of such Judge or Clerk, and the seal of the court;

2. When granted by an officer who has a seal of office, under the hand and official seal of such officer."

§ 48. "Sec. 6. No acknowledgment of any conveyance, whereby any real estate is conveyed or may be affected, shall be taken, unless the person offering to make such acknowledgment shall be personally known to the officer taking the same to be the person whose name is subscribed to such conveyance as a party thereto, or shall be proved to be such by the oath or affirmation of a credible witness."

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party thereto, personally known to me to be the person described in, and who executed, the said foregoing (*or* annexed) instrument, and the said ..... duly acknowledged to me, that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

{L. S.} IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official Seal, at my office in the County of ..... the day and year in this Certificate first above written.

..... NOTARY PUBLIC.

Certificate of Acknowledgment by Husband and Wife (*see* §§ 47–49, 51, 54–57).

CONSULATE OF THE UNITED STATES OF AMERICA,
At .....

ON this ..... day of ..... A. D. One Thousand Eight Hundred and ..... before me, ... a Consul of the United States of America for ..... appointed to reside at ..... personally appeared the within named ..... and ..... his wife, whose names are subscribed to the foregoing (*or* annexed, *as the case may be*) instrument as parties thereto, severally personally known to me to be the same persons described in, and who executed, the said instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily, for the uses and purposes therein mentioned.

And the said ..... wife of said ..... who is personally known to me to be the person whose name is subscribed to the foregoing (*or* annexed) instrument as a party thereto, having been by me first made acquainted with the contents of said instrument, duly acknowledged to me, on an examination apart from and without the hearing of her said husband, that she executed the same freely and voluntarily, for the uses and purposes therein mentioned, without fear or compulsion, or undue influence of her said husband, and that she does not wish to retract the execution of the same.

{L. S.} IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official Seal, at my office in the City of .....the day and year in this Certificate first above written.

..... UNITED STATES CONSUL.

§ 49. "Sec. 7. The certificate of such acknowledgment shall state the fact of acknowledgment, and that the person making the same was personally known to the officer granting the certificate, to be the person whose name is subscribed to the conveyance as a party thereto, or was proved to be such by the oath or affirmation of a credible witness, whose name shall be inserted in the certificate."

§ 50. It will be noted that the nature of the document occasions no change in the form of the certificate, but the latter varies according to the character of the party who executed the instrument.

The following instructions on the same subjects are also general in their nature, but subject to *one* exception, which will be noted hereafter.

§ 51. "Sec. 8. Such certificate shall be substantially in the following form, to wit: 'State of California, county of ———, on this —— day of ———, A. D. ——, personally appeared before me, a notary public (or judge, or officer, as the case may be) in and for the said county, A. B., known to me to be the person described in, and who executed the foregoing instrument, who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.' "

"Sec. 9. When the grantor is unknown to the court, or officer, taking the acknowledgment, the certificate may be in the following form, to wit: 'State of California, county of ——— on this ——— day of ——— A. D. ——— personally appeared before me, a notary public (or officer as the case may be) in and for the said county, A. B., satisfactorily proved to me to be the person described in, and who executed the within conveyance, by the oath of C. D., a competent and credible witness for that purpose, by me duly sworn, and he the said A. B. acknowledged that he executed the same freely and voluntarily, for the uses and purposes therein mentioned.' "

§ 52. "Sec. 10. The proof of the execution of any conveyance whereby any real estate is conveyed or may be affected, shall be: 1. By the testimony of a subscribing witness; or, 2. When all the subscribing witnesses are dead, or cannot be had, by evidence of the hand-writing of the

party, and of at least one subscribing witness, given by a credible witness, to each signature."

Sec. 11–17 relate at large the circumstances under which, and the manner how, proof of execution may be taken and certified to.

§ 53. The officers by whom either acknowledgment or proof may be taken, subject likewise to the one exception named hereafter, are indicated by the following acts:

Sec. 4, of the statute above referred to, provides:

"The proof or acknowledgment of every conveyance affecting any real estate shall be taken by some one of the following officers:

1. If acknowledged or proved within this State, by some judge or clerk of a court having a seal, or some notary public or justice of the peace of the proper county.

2. If acknowledged or proved without this State, and within the United States, by some judge or clerk of any court of the United States, or of any State or Territory having a a seal, or by any commissioner appointed by the government of this State for that purpose."

3. If acknowledged or proved without the United States by some judge or clerk of any court of any State, Kingdom or Empire, having a seal, or by any notary public therein, or by any minister, commissioner or consul of the United States appointed to reside therein."

By act of 19th May, 1853, sec. 107,[a] power was conferred upon the Judges of the Supreme Court, of the district courts, of the Superior Court of San Francisco,[b] and of the county courts in any part of the State, upon Justices of the Peace and Recorders within their respective counties, and upon Recorders and Mayors within their respective cities,[c] to take and certify the proof and acknowledgment of a conveyance of real property, or of any other written instrument.

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[a] *Wood's Digest*, art. 717.

[b] This court has since been abolished.

[c] The terms "respective counties" and "respective cities" are generally considered to require that the acknowledgment by these officers must be taken *in* such county or city, and that they are only allowed to take the acknowledgment of deeds affecting real property, if the property be situated *within* their respective counties or cities.

Notaries Public were authorized to the same effect by act of April 30, 1857, sec. 6.[a]

By act of 20th March, 1850,[b] the governor of the State was authorized to appoint in each of the United States, and by amendment passed 11th February, 1858, also in each of the territories and districts of the United States, and in each foreign State, territory and colony, Commissioners of Deeds, to administer oaths and to take depositions and affidavits to be used in this State, and also to take the acknowledgment or proof of any deed, or other instrument to be recorded in this State, with the same force and effect in law, to all intents and purposes, as if done and certified by any officer within this State authorized by law to perform such acts.

ACKNOWLEDGMENT BY MARRIED WOMEN.

§ 54. The exception above alluded to, relates to the acknowledgment of the execution of deeds by married women.[c] This has been provided for in the conveyancing act in the following manner:

"Sec. 19. A married woman may convey any of her real estate by any conveyance thereof, executed and acknowledged by herself and her husband, and certified in the manner hereinafter provided, by the proper officer taking the acknowledgment."

"Sec. 21. Any officer authorized by this act to take the proof or acknowledgment of any conveyance whereby any real estate is conveyed or may be affected, may take and certify the acknowledgment of a married woman to any such conveyance of real estate."

These officers are named in sec. 4, inserted in § 53.

§ 55. "Sec. 22. No such acknowledgment shall be taken, unless such married woman shall be personally known to the officer taking the same, to be the person whose name is subscribed to such conveyance, as a party thereto, or shall be

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[a] *Wood's Digest*, art. 2844. [b] *Ibid.* art. 300.

[c] That is, during the lifetime of the husband; acknowledgment by a widow does not differ from that by a single person.

proved to be such by a credible witness; nor unless such married woman shall be made acquainted with the contents of such conveyance, and shall acknowledge on an examination, apart from and without the hearing of her husband, that she executed the same freely and voluntarily, without fear or compulsion, or undue influence of her husband, and that she does not wish to retract the execution of the same."

§ 56. Acknowledgments under these provisions will be good and sufficient for all deeds by married women, including a conveyance of the homestead, but excepting deeds affecting their *separate* estate.

The form of the acknowledgment of the latter deeds, unless made under the act of 1855, noted below, is, like that of all other conveyances by married women, controlled[a] by sec. 22, quoted above, but the officers by whom it may be taken, are not all the same.

§ 57. The sixth section of the act of April 17, 1850, (passed subsequent to the conveyancing act,) as amended Feb. 11, 1858, provides that "no sale or other alienation of any part of the separate property of the wife can be made, nor any lien or encumbrance created thereon, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon an examination separate and apart from her husband, before any judge of a court of record or notary public; or, if executed out of this State, then so acknowledged before some judge of a court of record, or before a commissioner appointed under the authority of this State to take acknowledgments of deeds; or before any minister, secretary of legation, or consul of the United States, appointed for and residing in the foreign country in which the said deed is to be acknowledged."

§ 58. The foregoing instructions apply to the execution of deeds by married women for the conveyance of their separate estate, where the husband joins in their execution. But married women, (when residing in California,) have been authorized by the first section of an act passed Feb. 14, 1855,[b] to convey their separate estate as fully as if unmarried, where the husband has not been *bona fide* residing in this State for

[a] Pease v. Barbiers, 10 *Cal. Rep.* p. 436.

[b] *Wood's Digest*, art. 2630.

one year previous, (see § 77,) and the acknowledgment for a conveyance under this act is therein provided for as follows:

"Sec. 2. The execution of an instrument of conveyance by a married woman, independent of her husband, as provided in the preceding section, shall be acknowledged before the district judge of the county, in which the lands described in the conveyance are located, and the judge taking such acknowledgment, shall, before he certify the same, be satisfied by the oaths of at least two credible disinterested citizens of this State, that the husband of such married woman does not, and for one year next preceding the day of acknowledgment, has not resided in this State, which fact, and the names of the witnesses by whom the same was proved, shall be recited in the certificate of acknowledgment."

§ 59. Though, in general, deeds which are not, or have been defectively acknowledged, are binding between the parties thereto, and operate as notice to third parties aware of their existence, it is not so with deeds of married women. At common law the civil existence of the wife was merged in that of her husband;[a] she could make no contract. The common law being the law of this State, except in so far as modified by its constitution or laws, the statute taking away this disability of married women, like any other statute changing the operation of the common law, must be strictly construed, and its provisions as strictly complied with.

The statute of April 17, 1850, constitutes the acknowledgment a *necessary* part of the conveyance of the estate of a

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[a] But in equity, the right which the husband had at law, to his wife's real estate, might be effectually excluded by a limitation to her separate use. Though not absolutely necessary when there is a clear trust by a direct gift to the wife herself, real estate, limited to the separate use of a married woman, is more usually and properly secured to her by vesting it in trustees. *Hill on Trustees*, pp. *406, *407. Although this mode of proceeding has been rendered unnecessary in this State by the act of April 17, 1850, yet the wife's separate property is in many instances so conveyed in trust. The legal estate is thereby vested in the trustees, but the husband and wife should join in the execution of any deed affecting such separate property, to show their assent to the act of the trustees. The certificate of the acknowledgment by the latter, should state the fact: that they acknowledged the execution of the deed *as trustees* to the separate use of the wife.

married woman. Without it, or with a defective acknowledgment, the deed is *absolutely void.*[a]

§ 60. On account of the particular requirements of the law with reference to the acknowledgment of deeds conveying the estate of a married woman, the better opinion is that she cannot act by an attorney, but only direct.

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[a] Selover v. American Russian Comm. Co., 7 *Cal. Rep.* p. 266. Morrison v. Wilson, April T., 1859. Under the statute, no presumption of acknowledgment, on the part of a married woman, to a deed, arises from the fact of her executing it. Pease v. Barbiers, 10 *Cal. Rep.* p. 436. It is not in the power of a court of equity to compel a married woman to correct an insufficient acknowledgment. Barrett v. Tewksbury, 9 *Cal. Rep.* p. 13.

CHAPTER III.

PROMISSORY NOTE. — INTEREST. — MORTGAGE. — HOMESTEAD. — SEPARATE PROPERTY. — TAXES. — INSURANCE.

PROMISSORY NOTE.

§ 61. The evidence of the debt, to be secured by mortgage, is generally a promissory note. Occasionally a bond under seal is used, but this is a more lengthy and a more formal instrument, whilst its use gives no advantages over the note. Mortgages are also made without either note or bond, constituting that document itself the sole evidence of debt. But, though no separate paper for the purpose of evidencing the debt is required[a] this mode is seldom adopted, and seems less desirable. Occasionally mortgage deeds are handled, and the mortgagee, for instance, would have no written acknowledgment of the debt and its terms, in his possession, until the mortgage-deed is returned from the recorder's office.

In most cases the promissory note and mortgage are made to provide that the principal debt shall become due and payable,[b] at the option of the mortgagee, upon any default in the payment of interest. The mortgagee thereby reserves the right to sue for interest separately, which he might prefer to a foreclosure upon principal and interest, in cases where payment of interest can be enforced independently of the premises pledged, and without disturbing his mortgage.

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[a] Whitney v. Buchanan, April T. 1859.

[b] The promissory note is often made payable at a specified place. In an action against the maker of such a note, it is not necessary to aver or prove presentment at maturity at that place, and refusal to pay. A failure to make such presentment could only be pleaded in defence, as to the question of costs and damages. Montgomery v. Tutt et al., 11 *Cal. Rep.* p. 307. But such presentment is *necessary* to hold endorsers liable on the note, and must be proved in an action against them.

INTEREST.

§ 62. The interest of money is regulated by act of March 13, 1850, as follows: [a]

"Sec. 1. When there is no express contract in writing, fixing a different rate of interest, interest shall be allowed at the rate of ten per cent. per annum, for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing, on any judgment recovered before any court in this State, for money lent, for money due on the settlement of accounts, from the day on which the balance is ascertained, and for money received to the use of another.

"Sec. 2. Parties may agree in writing for the payment of any rate of interest whatever on money due, or to become due on any contract. Any judgment rendered on such contract shall conform thereto, and shall bear the interest agreed upon by the parties, and which shall be specified in the judgment.

"Sec. 3. The parties may, in any contract in writing, whereby any debt is secured to be paid, agree, that if the interest on such debt is not punctually paid, it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt." [b]

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[a] *Wood's Digest*, art. 2838. This act only affects contracts entered into in California since its enactment. Interest follows the contract according to the law in existence at the time and place of the contract, or of the performance of it. A subsequent change of the legal rate of interest does not affect the contract. Aguirre v. Packard, Admin., October T. 1859; Macoleta v. Packard, Admin., October T., 1859.

[b] It may be here stated that the rule for casting interest, where partial payments have been made, is to apply the payment in the first place to the discharge of the interest then due; if the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of the principal sum remaining unpaid. If the payment be less than the interest due, the surplus of interest must not be taken to augment the principal, but interest continues on the former principal until the period when the payments, taken together, exceed the interest due. Connecticut v. Jackson, 1 *Johns. Chan. Rep.* p. 13. This rule prevails unless changed by agreement of parties. Backus v. Minor, 3 *Cal. Rep.* p. 232.

Promissory notes usually stipulate payment of interest *until paid;* but, notwithstanding that nothing is said about interest after maturity, a money demand draws interest after maturity at whatever rate was expressed in the

MORTGAGE.

§ 63. A mortgage on real property in the State of California, is a lien upon an estate by way of pledge for the security of debt, and to become void on payment. At common law, a mortgage vested the legal title in the mortgagee, subject to be defeated by the performance of the condition subsequent, that is, payment at the appointed time, but this is entirely changed by our system; the legal title to the estate, and the right of possession, remain in the mortgagor, subject to be divested by a foreclosure and sale.[a]

A mortgage is a mere lien, and default in the payment of the money secured, does not change its character,[b] nor can *any* breach of its conditions, of itself, possibly vest the title in the mortgagee.[c] He can by no act of his become the owner of the property, except by purchase upon sale, consummated by conveyance.

Nor is he entitled to the possession; the act of April 29, 1851, to regulate proceedings in civil cases, provides expressly (sec. 260)[d] that "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale."

§ 64. The form of the mortgage deed is generally the same as that of an ordinary deed, or conveyance, of real property,[e] but stating that it is made because of and for the

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written contract, and a judgment thereon bears the same rate of interest. Kohler v. Smith, 2 *Cal. Rep.* p. 597. But though the contract may stipulate compound interest on the debt, interest on a judgment cannot be compounded. See *post*, § 115, note.

[a] Belloc v. Rogers, 9 *Cal. Rep.* p. 123.

[b] McMillan v. Richards, 9 *Cal. Rep.* p. 365.

[c] Godeffroy v. Caldwell, 2 *Cal. Rep.* p. 489.

[d] *Wood's Digest*, art. 994.

[e] But a mortgage may exist in various other modes; for instance, where a conveyance of land, on its face absolute and for a valuable consideration, and a defeasance, or an agreement to reconvey on payment of a certain sum with interest on a certain day, are executed at the same time, the deed will be treated, *as between the parties*, as a mortgage. In chancery, whenever it appears from written evidence, that land is conveyed as a pledge to secure the payment of money, the conveyance will be so treated, in whatever form

better securing the payment of a certain indebtedness, with the proviso added that if the debt is paid at maturity, then the conveyance to be void, but if not paid, the owner may foreclose the mortgage, and have the property therein described sold, and the debt and all costs of foreclosure paid from the proceeds of the sale. Sometimes also, the mortgage empowers the mortgagee to sell in a certain manner, and to execute a conveyance.

The promissory note should be so described in the mortgage as to identify it beyond question. More generally the contents of the note are recited at large.

§ 65. The mortgage deed should contain a waiver of the rights of homestead, and separate property of married women, if such rights attach to the property pledged, and should condition for the payment, by the mortgagor, of taxes, as well on the mortgage as on the property, street assessments, and premiums of insurance; the mortgagee reserving the right, if not so paid when due, to effect such payments, the same with interest to be a charge on the estate.

§ 66. The time for which mortgages are made in California, is generally one or two years; sometimes for a much longer period, and this mostly when the lender allows the principal sum to be repaid in monthly or other stated instalments. Mortgages are frequently allowed to remain in force for an indefinite period, but many mortgagees object to a continuance exceeding four years after maturity of the debt, on the ground that the statute of limitations (Sec. 17, see § 136) bars all actions at law on any written evidence of debt, unless commenced within four years from its maturity.

§ 67. The question whether the operation of the statute of limitations upon the promissory note secured by the mortgage, will, after the time limited for the commencement of an action upon the note, prevent the mortgagee from enforcing in a court of equity his lien upon the mortgaged property, has not yet come before the Supreme Court of this State. But the decisions of some of the highest tribunals in

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the land is pledged. Hicks v. Lowe, 10 *Cal. Rep.* p. 197. See also Woodworth v. Guzman, 1 *Cal. Rep* p. 203; Ferguson v. Miller, 4 *Cal. Rep.* p. 97. In order, however, to render such transaction a security against subsequent purchasers and mortgagees, both instruments should be recorded.

the United States, seem to leave little doubt as to the manner in which the Court would decide this question.

Parsons says in his treatise on Mercantile Law, (250): "It is important to remember that the statute of limitations does not avoid or cancel the debt, but only provides that no action shall be maintained upon it, after a given time." "But it does not follow, that no right can be sustained by the debt, although the debt cannot be sued." "His pledge or mortgage is as valid and effectual as it was before, and as far as it goes, his debt is secure; and for the purpose of realizing this security, by foreclosing a mortgage for instance, he may use whatever process is necessary on the note itself."

In *Thayer* v. *Mann*[a] it is said: "The debt remains, although the statute may discharge the remedy on the note, and a reference to the condition in the mortgage shows that it is to be and remain in force until the debt shall be paid." In the case of *Elkins* vs. *Edwards*,[b] it is expressly decided, that when a mortgage is given to secure a note, and the remedy of the latter is barred by the statute of limitations, and the debt is unpaid, the creditor may avail himself of his lien and foreclose his mortgage. And the court gives as the reason of his ability to do so, that he (the creditor) stipulated by contract for the remedies against his debtor, to enforce the collection of his demands; these two remedies are totally distinct; the one by an action at law on the note—one of the written evidences of his debt—the other by a bill of equity, to procure a sale of the mortgaged premises.

In *Soy* v. *Adams*,[c] it is said: "A mortgage security has not been deemed to be within any branch of the statute of limitations, ... he has not been allowed to defeat the right of the mortgagee by showing that the personal security to which the mortgage security is collateral security, has become barred by the statute of limitations."

Judge McAllister, of the United States Circuit Court for this State, after quoting the above and many other authorities, affirmed this doctrine in the case of *Spark et al.* v. *Pico*, decided at the January Term, 1859.[d]

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[a] 19 *Pick. Rep.* pp. 535, 537.
[b] 8 *Geo.* p. 325.
[c] 26 *Maine*, p. 330.
[d] 1 *McAllister's Rep.* p. 497.

On the same grounds, Judge Norton, of the Twelfth District Court in this State, overruled a demurrer setting up the statute of limitations, and ordered decree of foreclosure to be entered in the case of *Lacy* v. *Lott.*[a]

§ 68. But admitting, as is most probable, that the mortgagee will be allowed likewise by the Supreme Court of this State, to avail himself of his lien, though action on the note be barred, yet the latter fact prevents him from obtaining a *personal* judgment against his debtor, and he would therefore have no means of enforcing payment of any deficiency remaining after sale of the mortgaged premises.

HOMESTEAD.

§ 69. The right of homestead should be relinquished to the mortgagee, wherever it may exist, or it will take precedence of the mortgage. This right of homestead takes, to a certain extent, the place of the right of dower in other countries.

The constitution of this State provides (art. XI. sec. 15) that the legislature shall protect by law the homestead of all heads of families, or a certain portion of it, from forced sale, and the legislature has given effect to this provision by an act passed April 21, 1851,[b] in the following manner:

§ 70. "Sec. 1. The homestead, consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, not exceeding in value the sum of five thousand dollars,[c] to be selected by the owner thereof, shall not be subject to forced sale on execution, or any other final process from a court, for any debt or liability contracted or incurred after thirty days from the passage of this act, or if contracted

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[a] December, 1859.

[b] *Wood's Digest*, art. 2580, et seq.

[c] Where the property claimed as a homestead exceeds in value the sum of five thousand dollars, the act provides in what manner so much of it as will not exceed this amount shall be set apart. In cases where such segregation is impracticable, it is the duty of appraisers to ascertain and report the value of the property; then, after taking five thousand dollars from the valuation, if it exceed that amount, the remainder will be the undivided interest in the property subject to be sold on execution. Gary v. Easterbrook, 6 *Cal. Rep.* p. 457.

or incurred at any time in any other place than in this State."

§ 71. "Sec. 2. Such exemption shall not extend to any mechanic's, laborer's or vendor's lien, or to any mortgage lawfully obtained;[a] but no mortgage, sale, or alienation of any kind whatever of such land by the owner thereof, if a married man, shall be valid without the signature of the wife to the same, acknowledged by her separately and apart from her husband; *provided*, that the wife be a resident of this State, and that such signature and acknowledgment shall not be necessary to the validity of any mortgage upon the land executed before it became the homestead of the debtor, or executed to secure the payment of the purchase-money."[b]

§ 72. "Sec. 10. The homestead and other property exempt from forced sale, upon the death of the head of the family, shall be set apart by the Probate Court for the benefit of the surviving wife and his own legitimate children," etc.[c]

§ 73. The homestead is the dwelling-place of the family where they permanently reside,[d] but it cannot attach upon land held in common, or by joint tenancy.[e] The premises are

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[a] Nor to taxes. See sec. 11 of the same act.

[b] When a mortgage is given as security for the purchase-money of the mortgaged premises, no homestead can be carved out of the property so as to impair the rights of the mortgagee. Montgomery v. Tutt et al., 11 *Cal. Rep.* p. 190. Or even when made for money obtained to pay off the vendor's lien. A clear title to the homestead cannot vest until the payment of the purchase-money; and it makes no difference, in equity, whether the first debt be renewed or another debt created to raise money to pay it off. Carr v. Caldwell, 10 *Cal Rep.* p. 380. Where a mortgage, executed before the property became a homestead, is cancelled by means of money raised on a new mortgage in which the wife does not join, the property being then a homestead, the substance of the transaction, as regarded in equity, is an assignment of the old mortgage in consideration of the money advanced. Swift v. Kraemer, April T. 1859.

[c] The wife has no right to the homestead independent of her husband; if surviving him, she takes the homestead as property set apart to her by law, upon the distribution of her husband's estate. Gee v. Moore, Oct. T. 1859. But whether she succeeds to the homestead in her own right, or as trustee for the legitimate children, where there are such, of the deceased, has, it seems, not yet been decided. See *In re* Tomkins' Estate, 12 *Cal. Rep.* p. 114.

[d] Cook v. McChristian, 4 *Cal. Rep* p. 23.

[e] Davis v. Fleishacker, 5 *Cal. Rep.* p. 244; Reynolds v. Pixley, 6 *Ibid.* p 165; Kellersberger v. Kopp, 6 *Ibid.* p. 563.

never impressed with the character of homestead until actual residence on them by the family.[a] As long as the premises retain this character, they cannot be alienated, except by a *joint* deed, executed by both husband and wife, and properly acknowledged (see §§ 54, 55;) if they should undertake to execute two separate deeds for the homestead, it has been held[b] that both would be invalid. A conveyance by the husband alone is absolutely void as to the homestead value,[c] (but valid for any excess,) except where the signature of the wife is not required, under the proviso in sec. 2 of the homestead act (*ante*, § 71).

But the invalidity of a deed for the homestead, on account of its not having the wife's signature and acknowledgment, only goes to the extent essential to the object of the statute. After the termination of the homestead by absolute abandonment,[d] whereof removal by the husband with his family is presumptive evidence,[e] or by the death of the wife without children,[f] the husband cannot recover possession under the act.

§ 74. The separate property of the husband may become the homestead, as well as the common property acquired after marriage. But it is very doubtful whether the separate property of the wife can become the homestead. The constitution expressly says, that all property of hers acquired in a certain manner, shall be her *separate* property (art. XI. § 14), and it may admit of much doubt whether the mere act of the wife, of residing with her husband on the premises, it being her duty to live with her husband, can be construed into a change of her constitutional right with respect to her separate property.[g]

In the absence of a decision on this point since such doubts have been expressed, it would appear prudent by taking a mortgage on separate property of the wife, which is, or at any time had been, the residence of the family, to have both

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[a] Cary v. Tice, 6 *Cal. Rep.* p. 625; Benedict v. Bunnell, 7 *Ibid.* p. 245.

[b] Poole v Gerrard, 6 *Cal. Rep.* p. 71.

[c] Sargent v. Wilson, 5 *Cal. Rep.* p. 504; Revalk v. Kraemer, 8 *Ibid.* p. 66.

[d] Guiod v. Gourdon et al., January T. 1860.

[e] Harper et al. v. Forbes et al., January T. 1860.

[f] Gee v. Moore, October T. 1859.

[g] Revalk v. Kraemer, 8 *Cal. Rep.* p. 66.

rights waived by the husband and wife, and to have the execution of the instrument by the wife, acknowledged in such a manner as to comply with the requirements of the law in each case.[a]

SEPARATE PROPERTY.

§ 75. The act of April 17, 1850,[b] defining the rights of husband and wife, contains the following provisions:

"Sec. 1. All property, both real and personal, of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, shall be her separate property; and all property, both real and personal, owned by the husband before marriage, and that acquired by him afterwards, by gift, bequest, devise, or descent, shall be his separate property."

"Sec. 2. All property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property."

But the marriage contract, which shall be acknowledged and recorded to impart notice of its contents, may contain different stipulations.

§ 76. The separate property as above defined has been set apart for the wife by art. XI, § 14 of the Constitution of California, and in pursuance of that clause the act also directs that an inventory of such separate property shall be made out and signed by the wife, acknowledged or proved in the manner required for a conveyance of land, and recorded in the county where the parties reside, and in such other counties in which real estate, included in the inventory, may be situated. All property belonging to her, and included in the inventory, is exempt from execution for the debts of her husband.[c]

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[a] The *form* of acknowledgment, both for a conveyance of the homestead and for one of the wife's separate property, is that required under the conveyancing act for all conveyances by married women. See §§ 54–57. Pease v. Barbiers, 10 *Cal. Rep.* p. 436. That for the homestead must be taken before the officers named in sec. 4 of said act, quoted in § 53; but for that of separate property, the officers are expressly named by other acts, see §§ 57, 58.

[b] *Wood's Digest*, art. 2605, et seq.

[c] The capacity of the wife being created by the constitution, her title to

By sec. 6, as amended in 1858, it has been provided that no sale or other alienation of any part of the separate property of the wife can be made, nor any lien or encumbrance created thereon, unless by an instrument in writing, signed by the husband and wife.[a]

§ 77. It has been further provided by act of Feb. 14, 1855:[b]

"Sec. 1. That a married woman of legal age shall have power to convey and transfer lands or any estate or interest therein, vested in or held by her in her own right, as fully and perfectly as she might or could do if single or unmarried; *provided*, the husband of such married woman be not, and for one year next preceding the execution of the instrument of conveyance by the wife, has not been *bona fide* residing in this State."

Peculiar instructions are given for the acknowledgment of the wife's signature in each of these cases; see §§ 57, 58.

TAXES.

§ 78. All property of every kind and nature within the State of California, except churches, colleges, hospitals, etc., is taxed annually in proportion to its value, for the support of the State government, the county, and the city or town. The revenue laws provide how property shall be assessed at its full cash value. The general revenue law was passed April 29, 1857,[c] but by a supplementary act of April 29, 1859, the manner of assessing and collecting the taxes, was

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her separate estate depends *alone* upon the *mode of its acquisition*, and vests in her before the inventory can be filed. Selover v. Amer. Russ. Com. Comp., 7 *Cal. Rep.* p. 266. And the omission to record will not alter its mode of disposition, or subject it to the control of the husband, in any other manner than as the separate property of the wife.

[a] It may be doubted whether that portion of this section, which requires the signature of the husband to make a valid sale, or to create an incumbrance upon the separate property of the wife, can be sustained. No power is given her by law over the will of her husband, and to make his consent necessary to the sale and use of that which is exclusively hers, would seem inconsistent with the capacity conferred upon her by the constitution itself. The constitutionality of some other restrictions, by the same act, on her rights in her separate estate, seems equally doubtful. Selover v. Amer. Russ. Com. Comp., 7 *Cal. Rep.* p. 266.

[b] *Wood's Digest*, art. 2630.

[c] *Ibid.* art. 3003, et seq.

to a certain extent changed, as affecting the city and county of San Francisco. The latter act provides (sec. 9) that every tax shall, from and after the third Monday in October of each year, be a lien on all the real estate of the person delinquent, and on all real estate subsequently acquired by such person, until the tax is paid, or the title to the real estate has vested in a purchaser under a sale for taxes. But by the general law, which affects in this respect the entire State, except the city and county of San Francisco, every tax (sec. 32) is made a judgment against the person and a lien against the property assessed, dating from the first Monday in March in each year.

§ 79. The Board of Supervisors in each county sit during some time as a Board of Equalization, to determine all complaints made in regard to the assessed value of any property, and may correct any valuation, either by adding thereto or deducting therefrom, but the Board has not the right to raise the valuation without notice to the owner.[a] The tax collector is then authorized to demand and collect the taxes due, and property on which the taxes remain unpaid at the expiration of the time fixed by law, is advertised for sale during three weeks. At the time and place advertised, the tax collector proceeds to sell such property, or any part thereof, to the party who will take the least portion of it and pay the delinquent taxes.

§ 80. During six months after the sale the property is subject to redemption on payment to the purchaser of the amount of the purchase-money and fifty per cent. thereon in addition. If no redemption is made within that time, the tax collector will execute to the purchaser a deed conveying the title to the property sold. Under the general law, (sec. 23) the deed conveys the entire title, legal, equitable or otherwise, of the delinquent, but under the supplementary act (sec. 8) the *absolute* title is conveyed, free and clear of all encumbrances, mortgages, liens, claims, etc. of any person or corporation, except as regards the right and title of the United States, the State of California, or of minor children, who may redeem within one year after coming of age. Under

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[a] Patten v. Green, April T. 1859.

both laws, such deed is *prima facie* evidence of title,[a] and conclusive proof of the matter by it set forth, but courts of law and equity may examine with regard to such deed, into any alleged illegality of the assessment of the property, of the levy of the taxes, of the sale, and of the execution of the deed itself.

§ 81. The property being subject to sale for non-payment of taxes, it is proper that the mortgagee should be authorized, on default of the mortgagor, to pay them for account of the mortgagor, if he sees fit, and that his advances, with interest thereon, shall be a lien on the property under the mortgage. But where they remain unpaid, and the mortgagor suffers the land to be sold for taxes, and buys it in, he does not thereby defeat the lien of the mortgage, his purchase being only a mode of paying the taxes.[b]

Under the statutory provisions regarding the title conveyed, mentioned in § 80, owners have often allowed their real property to be sold for taxes, in order to cure by purchase, and Tax-Collector's conveyance on behalf of the taxing power, such defects as might exist in the title, where that power was the grantor; and under the supplementary act, which affects the city and county of San Francisco only, to complete the title, as against every claimant to the property.

INSURANCE.

§ 82. Policies of insurance taken for the better security of the mortgagee, are generally made out in the name of the owner of the premises, the loss, if any, being therein made payable to the mortgagee; or if not so made payable, then the policy is by the owner assigned to the mortgagee with the written assent of the insurance company. Up to this time no general fire insurance companies have been formed

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[a] This shifts the burden of proof from the party who claims under the tax-deed, to the party who attacks it, and the latter must show that the requirements of the law, as regards the assessment of the tax, levy, etc., have not, or not sufficiently, been complied with. Ferris v. Coover, 10 *Cal. Rep.* p. 589; Lachman et al. v Clark, October T. 1859.

[b] Frye v. Bank, etc., 11 *Illinois Rep.* p. 367; Ralston v. Hughes, 13 *Ibid.* p. 469.

in California, but a number of the best and most reliable companies of England and the Eastern States have agencies in San Francisco. The eastern companies send out blank policies signed by their officers, and to be filled out and countersigned by their agents. Most of them provide mortgagees with a covenant against the acts or neglect of the mortgagor,[a] which adds much to the value of insurance as an additional means of security.

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[a] This covenant is either inserted in the policy, or is contained in a special agreement in the following terms:

"In consideration of one dollar received to its full satisfaction, the . . . . . Fire Insurance Company of . . . . . doth hereby agree with . . . . . of San Francisco, California, that all Policies of Insurance which have been, or may be, issued by the said . . . . . Fire Insurance Company, and which, with its assent, have been or may be assigned, or losses under which are made payable to the said . . . . . as mortgagee, shall not, as to the interest of the said mortgagee only therein, be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the policy.

"And it is further agreed, between the parties hereto, that the mortgagee shall notify said Company of any change of ownership or increase of hazard which shall come to his knowledge, and that every increase of hazard, not permitted by the policy to the mortgagor or owner, shall be paid for by the said mortgagee on reasonable demand, according to the established scale of rates, for the use of such increased hazard during the current year.

"And it is further agreed, between the parties hereto, that, whenever the said . . . . . Fire Insurance Company shall pay to the said mortgagee any sum for loss under any policy assigned as above, and shall claim that, as to the mortgagor or owner, no liability therefor existed, the said . . . . . Fire Insurance Company shall at once be legally subrogated to all the rights of the mortgagee under all the securities held as collateral to the mortgage debt, to the extent of such payment, or, at its option, may pay to the mortgagee the whole principal due, or to grow due, on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage, and all other securities held as collateral to the mortgage debt; but no such subrogation shall impair the right of the mortgagee to recover the full amount of his claim."

CHAPTER IV.

POSSESSION. — FIXTURES. — MECHANIC'S LIEN. — WASTE.

POSSESSION.

§ 83. Possession by the mortgagor at the time of the execution of the mortgage, is an important element of title, as involving the present enjoyment and profits, and avoiding the expense and delay of its recovery. Besides, possession[a] operates as notice, or evidence of notice,[b] of the possessor's title, whether legal or equitable, so as to place the subsequent purchaser in the position of his vendor with respect to such legal or equitable title of the possessor; and it may be proper here to mention that where a party has an equity, by purchase or improvement of the property, coupled with possession under the bona fide belief of ownership, whilst the legal owner has knowingly suffered such purchase or improvement to be made,[c] then all who purchase the legal title

[a] Hutchinson v. Perley, 4 *Cal. Rep.* p. 33; Winans v. Christy, 4 *Ibid.* p. 70. But it must be actual, *bona fide* occupation, a subjection to the will and control, as contradistinguished from the mere assertion of title, and the exercise of casual acts of ownership. A mere entry without color of title, accompanied by a survey and marking of boundaries, is not sufficient. Murphy v. Wallingford, 6 *Cal. Rep.* p. 648; Bird v. Lisbros, 9 *Ibid.* p. 1.

[b] In how far possession, by one having an unrecorded deed, has been considered to be evidence of notice, has been stated in § 41.

[c] There is no principle better established, or founded on more solid considerations of equity and public utility, than that which declares, that if one man *knowingly*, though he does it *passively* by looking on, suffers another to purchase, and expend money on land, under an *erroneous opinion* of his title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience would be bound by it. Wendell v. Van Rensselaer, 1 *Johns. Ch. Rep.* p. 354. The rule is: if one is intentionally silent when he *should* speak, justice will compel him to silence when he *would* speak. See Buckingham et al. v. Smith et al., 10 *Ohio Rep.* p. 298; Bryan v. Ramirez, 8 *Cal. Rep.* p. 461. Fraud of the owner, in silently permitting

of the grantor, *out of possession*, must take notice of the equity.[a]

FIXTURES.

§ 84. A mortgage of land carries with it all buildings and other fixtures which are or may be attached to the freehold,[b] even though not named, unless excluded expressly or by inference, as by mentioning those in only a part of the premises.[c]

The estate remains that of the mortgagor, with all the incidents of ownership, until after foreclosure and sale, by the conveyance a new owner is substituted,[d]—but in general, the possession of a mortgagor, or one claiming under him, is not regarded as *adverse* to, but *under* the mortgagee. Any buildings or other improvements placed by the mortgagor upon the land, must be considered as improvements made by him upon his own estate, with a view to the redemption of the property, and of which he has the full benefit in the enhanced value of the equity of redemption.[e] They cannot be removed by him before payment of the debt.[f] Even fixtures for trade cannot be removed by the mortgagor, though put up after execution of the mortgage,[g] if they are annexed to the freehold, that is fastened to or connected with it. As between mortgagee and mortgagor, the rule in relation to

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improvements to be made, entitles the party making them to hold the improvements. But this fraud only exists at the very most where the owner knows that the other person is making the expenditures, and also knows that he is making them under the *bona fide* reasonable belief that he is the owner of the property. McGarity v. Byington, January T. 1859. These cases, given to illustrate analogically the above principle, are instances of estoppel *in pais*, depending upon the fraud of the owner, irrespective of any abstract right of the possessor.

[a] 4 *Monroe's Ky. Rep.* p. 196; 5 *Johns. Ch. Rep.* p. 33; Bryan v. Ramirez, 8 *Cal. Rep.* p. 461.

[b] Rose v. Munie, 4 *Cal. Rep.* p. 173.

[c] Hare v. Horton, 5 *B. & Ad.* p. 715. See Longstaff v. Meagoe, 2 *Ad. & Ell.* p. 167.

[d] Guy v. Ide, 6 *Cal. Rep.* p. 99.

[e] Per Wills, J., 29 *Maine*, p. 116; Hunt v. Hunt, 14 *Pick.* p. 385.

[f] Butler v. Page, 7 *Met.* p. 40.

[g] Winslow v. Merchants' Insurance Co., 4 *Met.* p. 306.

fixtures obtains with the most rigor in favor of the mortgagee, and against the right to disannex from the premises, and to consider as a personal chattel, anything which has been affixed thereto.[a]

§ 85. So if land mortgaged, be sold under a decree of foreclosure, the purchaser will be entitled to the crops growing at the time of the sale, in preference to a person claiming under the mortgagor, and whose claim originated subsequently to the mortgage.[b] If the mortgagor makes preparations for a crop, he does it with a full knowledge that the land with the crops is subject to be sold, if the decree be obtained before he severs it. Nor does he loose anything by this; for the crop on the land enhances the price. If by this increase, the debt is overpaid, he gets the overplus; if not, still the value of his labor goes, as he had agreed it should go, to the payment of the debt.[c]

MECHANIC'S LIEN.

§ 86. In virtue of an act of April 19, 1856, amended March 18, 1857,[d] and April 22, 1858, master builders, mechanics, artisans, lumber merchants, and all other persons performing labor or furnishing materials for, or employed in the construction or repair of any building, wharf, bridge, ditch, flume, aqueduct, or other superstructure, have a lien on such buildings, etc., for the work and labor done, or material furnished by each respectively. The act must be strictly construed in all questions arising under it, because it gives rights in derogation of the common law.[e]

Sec. 4 provides that the land, or so much as may be necessary for the convenient use and occupation of the premises, shall also be subject to the lien, but it states also that nothing

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[a] 2 *Kent's Comm.* p. 346; Day v. Perkins, 2 *Sand. Ch. Rep.* p. 364; Sands v. Pfeiffer, 10 *Cal. Rep.* p. 258. For a review of the question of fixtures, see Merritt et al. v. Judd et al., July T. 1859.

[b] Jones v. Thomas, 8 *Blackf. Rep.* p. 428; Shepard v. Philbrick, 2 *Denio*, p. 174.

[c] Crews v. Pendleton, 1 *Leigh*, pp. 297, 305.

[d] *Wood's Digest*, art. 2797–2808.

[e] Bottomly v. Grace Church, 2 *Cal. Rep.* p. 90.

therein contained shall be construed as impairing any valid encumbrance upon the land, duly made and recorded before the work was commenced, or the first of the materials were furnished.[a]

The same right of lien is granted for grading or improving lots in any incorporated city or town, or streets adjoining such lots, when done under an express contract in writing. (sec. 12.)

§ 87. In order to render the lien effectual, a notice and account of the claim must be filed in the County Recorder's office, together with a correct description of the property,[b] within sixty days after the completion of the building or other structure. The lien is not binding for a longer period than six months after filing the same, unless suit be brought[c] in a court of competent jurisdiction within that time[d] to enforce the same, or if a credit be given, then within six months after the expiration of the credit, which should appear from the notice filed, but no lien shall be continued in force for a longer time than two years from the time the work is completed or the materials furnished, by any agreement to give credit.

Whenever such an action is instituted, the court notifies by publication all persons claiming liens on the premises under this act, to appear on a day specified, when their liens are determined. Liens under the act and not then presented, are deemed to be waived.

§ 88. It seems unnecessary for the purposes of these pages to review the act at length. The subject is important and

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[a] The materials must not only have been used in the construction of the building, but they must have been, by the express terms of the contract, furnished for the particular building on which the lien is claimed. Houghton v. Blake, 5 *Cal. Rep.* p. 240.

[b] If not correct, it will not impart notice to third parties; a notice describing property on a certain street, and between other streets, is insufficient. Montrose v. Conner, 8 *Cal. Rep.* p. 344.

[c] As in the case of a foreclosure of mortgage, all persons interested in the estate, at the time the suit is instituted, should be made parties, or their rights will not be affected. Whitney v. Higgins, 10 *Cal. Rep.* p. 547.

[d] The statute requires that every lien on the same property shall be litigated and enforced in the same action. The filing of the intervention, and becoming a party to the suit within the prescribed period of six months, gives precisely the same effect to the position of the intervenor as if he had commenced an original action. Mars v. McKay et al., October T. 1859.

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renders it indispensable when about making an investment, to ascertain satisfactorily, that there is not, nor recently has been, occasion for the existence of the liens referred to, as they attach by relation from the date of the commencement of the work, and all persons who deal with the property during the progress of the work, are charged with notice of the claim of the contractor. After he has entered, however, upon the erection of the building, he cannot so alter his contract, as to create a greater or different lien on the premises, whereby a claim of a third party would be injured, who had loaned money on the property, whilst the original contract existed.[a]

Where the money is borrowed during the process of building, the mortgagee generally pays only after expiration of the time limited for filing liens, or if paying before, obtains additional security until such time, or he undertakes the application of the money advanced, to the liquidation of the claims of mechanics and material men given, as they become payable.

The mortgage carrying all buildings which are, *or may be*, attached to the freehold, a mechanic's lien, like any other incumbrance created subsequent to the record of the mortgage, is subordinate to it.

WASTE.

§ 89. Although a mortgagor in possession is regarded as the owner of the land, and as such entitled to the temporary rents and profits, yet, inasmuch as the very purpose of the mortgage would be defeated by any acts affecting the permanent value of the property, the law will in some form interpose, either to prevent the commission of waste by the mortgagor, by an injunction from a court of equity, especially if the debt is thereby endangered, or to compensate the mortgagee for the value thus taken from the land, by the mortgagor's giving additional security, or otherwise.[b]

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[a] Soule & Page v. Dawes, 7 *Cal. Rep.* p. 576; Crowell et al. v. Gilmore et al., April T. 1859.

[b] 1 *Hilliard on the Law of Mortgages*, pp. 206, 207, 2d ed., quoting Gray v. Baldwin, 8 *Blackf.* p 164, and other authorities.

In the exercise of his rights the mortgagor is limited by his pledge to the mortgagee, of the fixtures and improvements existing on the land, or such as may afterwards be placed thereon ; if removed they may be followed and recovered by the mortgagee.

From the commencement of the action the statute directly interferes, for the purpose of preventing injury to the property. The Practice act contains the following on this point :

§ 90. During the foreclosure : "Sec. 261.[a] The court may, by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon ; or after a sale on execution, before a conveyance."[b]

For the subject of waste on appeal from a judgment, see hereinafter § 116, and for waste during the time allowed for redemption, § 125.

§ 91. Recovery of damages : "Sec. 262.[c] When real property shall have been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession, after sale, and before possession is delivered under the conveyance."

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[a] *Wood's Digest*, art. 995.

[b] The remedy afforded by this section is only preventive ; it is not exclusive of any other remedy. Sands et al. v. Pfeiffer et al., 10 *Cal. Rep.* p. 258.

[c] *Wood's Digest*, art. 996.

CHAPTER V.

ASSIGNMENT.—RELEASE.

ASSIGNMENT.

§ 92. By the transfer of a claim secured by mortgage, the mortgage as well as the debt is in most cases *expressly* assigned, and the assignee is thereby put in the place of the mortgagee, to all intents and purposes, and is subrogated to all his rights.[a]

This is the usual and almost invariable mode, but the mortgage being but an incident to the debt, the indorsement of a negotiable promissory note, secured by mortgage, carries with it the security, without a formal assignment of the mortgage.[b]

§ 93. For the same reason the mortgage cannot pass without a transfer of the debt.[c] An assignment of the interest of the mortgagee in the land, without an assignment of the debt, is considered in law as a nullity.[d] Mr. Chief Justice Kent says: "It cannot and ought not to be detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no de-

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[a] Johnson v. Dopkins, 3 *Cal. Rep.* p. 195.

[b] Ord v. McKee, 5 *Cal. Rep.* p. 515; Phelan v. Olney, 6 *Cal. Rep.* p. 478. Where after transfer of the mortgage by a mere indorsement of the note, the mortgage should be discharged, great inconvenience might arise in cases where the chain of title has to be established or made clear. The release might appear on record, but the records would show no authority in the indorsee to grant a discharge.

[c] Peters v. Jamestown Bridge Co., 5 *Cal. Rep.* p. 334.

[d] Jackson v. Bronson, 19 *John.* 325. Where a mortgagee makes a deed of the mortgaged property, or his interest therein, it conveys no right thereto, neither does it operate as an assignment of the mortgage. A subsequent assignee or purchaser of a mortgage, cannot be charged with constructive notice of any act of the mortgagee or his representative subsequent to the mortgage, except its assignment or satisfaction duly entered of record. Peters v. Jamestown Bridge Co., 5 *Cal. Rep.* p. 334.

terminate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the note or bond."[a] The assignment of a mortgage, without the debt, creates at most a *naked trust*,[b] and in this view it so far divests the title of the mortgagee, that he has no power to discharge the mortgage or any part of it.[c]

§ 94. A married woman cannot make an assignment of a mortgage made to her, except in the mode prescribed for the alienation of her separate estate. If it be common property of husband and wife under the statute, the husband can assign it in his own name, he having the sole control of the common property.[d]

§ 95. The question how far the assignee of a mortgage is bound by the actual state of the account between the mortgagee and mortgagor at the time of the assignment, has frequently been a subject of discussion.

The general rule is, that an assignee takes the mortgage subject to all equities existing between the original parties, and between the debtor and a prior assignee, that is, he cannot claim what appears to be due upon the face of the mortgage, but only what is really due, after deducting all payments and offsets. It is held, that *a payment* made to the mortgagee at any time before notice of the assignment, is good against the assignee.[e] If it be stated in the assignment that a certain sum is due for principal and interest, although the mortgagee is bound by the statement, the mortgagor is not, unless a party to the assignment.[f]

But if the mortgage is given to secure a negotiable note, and both are assigned before maturity to a bona fide indorsee, he takes clear of any equities between the original parties.[g]

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[a] Jackson v Willard, 4 *Johns.* p. 43; Wilson v. Troup, 2 *Cow.* p. 195; McGan v. Marshall, 7 *Humph.* p. 121; Garroch v. Sherman, 2 *Halst. Ch.* p. 219; Edward v. Varick, 5 *Denio*, p. 664; Bailey v. Gould, *Walk. Ch.* p. 478.

[b] 2 *Story's Comm. on Eq. Jurisp.* § 1023, note. See 4 *Kent's Comm.* p. 194, 4th ed.

[c] McCormick v. Digby, 8 Blackf. p. 99.

[d] Tryon v. Sutton et al., April T. 1859.

[e] Hubbard v. Turner, 2 *McL.* p. 519.

[f] James v. Morey, 2 *Cow.* p. 247; Wolcott v. Sullivan, 1 *Edw.* p. 402: Norrich v. Marshall, 5 *Mad.* p. 481; Carew v. Johnston, 2 *Sch. and Lef.* p. 296.

[g] Reeves v Scully, *Walk. Ch.* p. 248. See Payne v. Bensley, 8 *Cal. Rep.* p. 260; Robinson v. Smith et al., July T. 1859.

§ 96. Excepting the last mentioned case, it is evident that a person taking an assignment of mortgage, should exercise great caution, by application to the mortgagor or otherwise, in ascertaining the precise amount due, and in such manner as to be susceptible of proof; and he is further, in his own interest, obliged to give notice of the assignment to the mortgagor. For, although the recording or registration of the assignment is legal notice to those claiming under a subsequent transfer from the mortgagee or his representatives, it has been held that it is not equivalent to actual notice as regards the mortgagor, and that the latter may make valid payment of the mortgage debt to the mortgagee, such registration notwithstanding, unless he have actual notice.[a]

But where the mortgage secures the payment of a negotiable note given for the debt, and the mortgagee is unable to produce such note, this circumstance should put the mortgagor on his guard, and want of inquiry on his part may invalidate his payment to such mortgagee.

§ 97. Both objects can be attained by making the mortgagor a party to the assignment of the mortgage, thus, of course, precluding him and his heirs or assigns from a denial that the face of the mortgage exhibits the true state of the mortgagee's claim, and likewise preventing further payments from him to the mortgagee. This practice is not general, but has been strongly recommended. Lord Loughborough remarks upon this subject: "It was supposed that in practice there is no occasion to make the mortgagor a party, and in some cases it may not be possible to make him a party to the assignment; and to hold that the assignee of a mortgage is bound to settle the accounts of the person from whom he takes the assignment, would tend to embarrass transfers of mortgages." "Persons most conversant in conveyancing, hold it extremely unfit and a very indifferent security, to take an assignment of a mortgage without the privity of the mortgagor as to the sum really due. No conveyancer of established practice would recommend it as a good title, to take

[a] Williams v. Sorrell, 4 *Ves. Jun.* p. 389; Matthews v. Wallwyn, 4 *Ves. Jun.* p. 118; *Coote on Mortgages*, p. 441; New York Life, etc. v. Smith, 2 *Barb. Ch.* p. 82; 2 *Cow.* p. 246.

an assignment of a mortgage without making the mortgagor a party, and being satisfied that the money was really due."[a]

RELEASE.

§ 98. A mortgage being given as security for a debt, the general rule is that nothing but actual payment of the debt, or an express release, will operate as a discharge of the mortgage. The lien lasts as long as the debt,[b] but no longer.[c]

But a mortgage debt may be extinguished, as a personal claim against the mortgagor, and the land still remain liable for the amount of such debt.[d] The mortgagee in such case in fact releases the mortgagor of all liability for any part of the debt, which might remain unpaid after sale of the land.

§ 99. On the other hand the mortgagee may part with his security, and release the property mortgaged, or a portion of it, without in any manner affecting the liability of the debtor on the note. The debt has an independent existence, and remains with all its original validity, notwithstanding such release,[e] for the entering of a discharge of the land from the mortgage by the mortgagee, does not of itself, (that is without mentioning payment or satisfaction,) discharge the debt, but merely the security.[f]

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[a] Watthews v. Wallwyn, 4 *Ves.* p. 128; see 1 *Powell on Mortgages*, p. 152.

[b] Morse v. Clayton, 13 *Sm. and M.* p. 373; 1 *Freem. Ch.* p. 307; Burton v. Cressly, 1 *Chev.* 2d part. Thus, in general, a mortgage made to secure a promissory note will remain security for any new note given in payment of the former one, this transaction not being looked upon as a payment of the debt. Burdett v. Clay, 8 *B. Monr.* p. 287; Bank, et al. v. Finch, 3 *Barb. Ch.* p. 293; Heard v. Evans, *Freem. Ch.* p. 79; Spring v. Hill & Carr. 6 *Cal. Rep.* p. 17. Unless there is an intention to the contrary. Haddock v. Bullfinch, 31 *Maine*, p. 246. Taking a second mortgage is no waiver of a prior one made for the same debt; and taking personal security for a mortgage debt is no waiver of the mortgage. Burdett v. Clay, 8 *Monr.* p. 287. Where land mortgaged is taken for public uses, the damages awarded become a substitute for the land, and subject to the lien thereof. Astor v. Miller, 2 *Paige*, p. 68.

[c] Where the mortgage debt is paid, the mortgage cannot be kept alive by a parol agreement, as security for another debt. Mead v. York, 2 *Seld.* p. 449.

[d] Tripp v. Vincent, 3 *Barb. Ch.* p. 614.

[e] Hatch v. White, 2 *Gallis* p. 152.

[f] Sherwood v. Dunbar, 6 *Cal. Rep.* p. 53.

But if a portion be released, it will be well to ascertain by the records whether there are any subsequent purchasers of parts of the premises mortgaged, or whether the interests of holders of subsequent liens, on parts of the mortgaged property, may be prejudiced by so doing. The record gives subsequent incumbrancers only notice of the mortgage, as an undivided lien upon all the property mortgaged to secure that particular debt. And if, for instance, a second mortgage or other lien exists on some of the land, the holder thereof has the right to require that the debt secured by the first mortgage, be on foreclosure in the first place satisfied out of such parts of the property as are not subject to his lien. But his chances for obtaining payment may be materially diminished by a previous release of some of them. A sense of justice will prompt an inquiry of this sort, though there is no authority which enjoins it, as the risk of such partial release being made, is deemed inherent to the nature of such subsequent lien.

Where, however, the mortgagee *with notice* of the rights of subsequent purchasers or mortgagees, releases a part of the premises primarily liable for the payment of the debt secured by the mortgage, it has been held that he cannot enforce his lien against the residue, without deducting the value of the part released.[a] But the mere recording of a subsequent deed or mortgage is, of itself, not notice to the prior mortgagee.[b]

§ 100. The act concerning conveyances, before referred to, gives the following instructions about the mode of releasing mortgages:[c]

"Sec. 37. Any mortgage that has been or may hereafter be recorded, may be discharged by an entry in the margin of the record thereof, signed by the mortgagee or his personal representative or assignee, acknowledging the satisfaction of the mortgage, in the presence of the recorder or his deputy, who shall subscribe the same as a witness, and such entry shall have the same effect as a deed of release duly acknowledged and recorded.[d]

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[a] Stuyvesant v. Hall, 2 *Barb. Ch.* p. 151.

[b] Stuyvesant v. Hall, 2 *Barb. Ch.* p. 151; King v. McVicker, 3 *Sandf. Ch.* p. 192.

[c] *Wood's Digest*, art. 374–376.

[d] An objection to a discharge by a mere entry upon the margin of the record

§ 101. "Sec. 38. Any mortgage shall also be discharged upon the record thereof, by the recorder in whose custody it shall be, whenever there shall be presented to him a certificate[a] executed by the mortgagee, his personal representative or assignee, acknowledged, or proved and certified as hereinbefore prescribed to entitle conveyances to be recorded, specifying that such mortgage has been paid or otherwise satisfied or discharged."

§ 102. "Sec. 39. Every such certificate, and the proof or acknowledgment thereof, shall be recorded at full length, and a reference shall be made to the book containing such record, in the minutes of the discharge of such mortgage, made by the recorder upon the record thereof."

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is, that there is nothing in the hands of the parties in interest to show the important fact; for every other transaction concerning real estate the original document remains with them.

[a] There are many instances where a mortgage has been discharged by a brief certificate indorsed on the mortgage deed, that the "within" or "preceding" mortgage, (or similar terms,) has been satisfied, and these releases have been recorded in the appropriate register. This record however is considered insufficient, unless the entire mortgage deed be recorded, or rerecorded, as the case may be, together with such release. Assignments of mortgages have often been made and recorded in a similar manner. This insufficient mode of recording has led to the entire rejection of titles, by intended purchasers or mortgagees, where neither the indorsed mortgage deed, nor a new assignment or release, could be had.

CHAPTER VI.

EQUITY OF REDEMPTION. — SETTLEMENT ON DEATH OF MORTGAGOR. — FORECLOSURE. — SALE. — REDEMPTION.

EQUITY OF REDEMPTION.

§ 103. The execution and delivery of the mortgage deed at common law, transfer the legal estate and vests it in the mortgagee, but by the terms of the instrument itself, there is remaining to the mortgagor the right to recover the entire estate on payment of the debt by a certain day. Under the common law, if such payment was not made at the time appointed, the conditional title of the mortgagee changed by that fact into an absolute title. As the object of a mortgage is to furnish security only, and not a sale of property, it was considered unjust in an equitable view of the transaction, that the mortgagor should lose his estate by reason of nonpayment at the precise time specified, a default for which many and various causes might exist.

Therefore courts of equity interposed, and decreed that the debtor or his representatives, could redeem his estate also after default, provided he did so within a reasonable time, not exceeding twenty years.[a] This right which did not exist at law, and is purely a creature of courts of equity, is styled the debtor's equity of redemption.

The mortgagee on the other hand is under the common law, allowed to come into court, and require the debtor to perform his contract, or, on his then remaining in default, have his equity of redemption barred and foreclosed forever, the mortgagee thereby becoming absolute owner of the premises. This is the recognized mode in England.

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[a] 4 *Kent's Comm.* pp. 187, 188.

§ 104. In this State, as in most of the United States, mortgages stand on a different footing, involving a different mode of foreclosure, and the debtor not only continues to enjoy his equitable right of redemption as before, but remains the legal owner. Whether a court of equity would allow so long a term as twenty years in California, where the statutory limitations allow proportionably shorter terms than in many other countries, may, perhaps, be considered doubtful; the question has not yet presented itself before the courts.

§ 105. No person can come into a court of equity to redeem property from the lien of a mortgage, but the mortgagor, or whoever may be entitled to his legal estate, or claims a subsisting interest or lien under him.[a]

It has often been stated that a decree under foreclosure terminates this equity of redemption, as regards every person who has been made a party defendant. After having had his day in court, and an opportunity of setting up any equities he possessed, his equitable right is said to be barred by the decree.[b] The better opinion, however, seems to be that his right is not barred by the decree, but by a sale under it.

§ 106. As will be seen from the foregoing, the equity of redemption is the real and beneficial estate in the land which may be sold and conveyed by the mortgagor, in any of the ordinary modes of conveyance.[c] Hence a second mortgage will not in any manner interfere with the first one, for it will only cover the mortgagor's equity of redemption under the previous mortgage.

SETTLEMENT ON DEATH OF MORTGAGOR.

§ 107. The statute provides a way of settling mortgages in case of death of the mortgagor. By the act of May 1st, 1851,[d] to regulate the settlement of the estates of deceased persons, the manner is pointed out in which all claims against

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[a] Grant v Duane, 9 *Johns*, 611.

[b] Whitney v. Higgins 10 *Cal. Rep.* 554; Montgomery v. Tutt, 11, *Cal. Rep.* p. 307.

[c] McMillan v. Richards, 9 *Cal. Rep.* p. 365.

[d] *Wood's Digest*, art. 2222 et seq.

them shall be presented to the executor or administrator,[a] and if allowed by him, to the judge of the probate court, when if allowed it shall be ranked among the acknowledged debts of the estate, and be paid. (Sec. 128—133.) Also, how suit shall be brought for a rejected claim, and that no action shall be brought on any claim unless the same shall first have been presented, which need not be done until due, including claims on which an action was pending, or a judgment had been recovered against the deceased, at the time of his death. (Sec. 134—141.)

No sale by an executor or administrator,[b] of any property of an estate shall be valid, if not made under order of the probate court (sec. 148,) unless the deceased has by will made provision for the sale. (Sec. 178.)

When the land is subject to any mortgage or lien, the proceeds of the sale of that property shall be applied after paying the necessary expenses of the sale, in the first place to the payment of such mortgage or lien. Where there is a deficiency remaining, after the application of the proceeds of mortgaged premises to the payment of the amount due, the claim for such deficiency must be presented to the executor or administrator, (sec. 141)[c] and will rank as a judgment amongst the claims against the estate. (See sec. 239.)

§ 108. Mortgages may be presented and settled in this manner under the act referred to. It has even been held by the Supreme Court of this State,[d] that after the death of the mortgagor, no action could be brought upon mortgages unless the claim had been presented to the executor or administrator, in accordance with the above act, and had been by

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[a] The Probate Court issues letters of administration. Where there is no next of kin entitled to share in the distribution of the estate, such letters are granted to the public administrator, an officer under bonds, elected every two years, who continues the administration even after the expiration of his term of office, until his authority is directly set aside, or indirectly revoked by another appointment, in such estate. Rogers, Public Admin. v. Hoberlin, 11 *Cal. Rep.* p. 120.

[b] See Cowell et al., v. Buckelew and wife, January T. 1860. The administrator's deed conveys to the purchaser the title of the deceased, such as it is. In these sales, *caveat emptor* is the rule. Halleck v. Guy, 9 *Cal. Rep.* 181.

[c] Cowell et al., v. Buckelew and Wife, January T., 1860.

[d] Falkner v. Folsom's Executors, 6 *Cal. Rep.* p. 412; Ellissen v. Halleck, 6 *Ibid.* p. 386.

him rejected. But where the mortgagee, without previous presentation of the claim, served the administrator with process, and the latter made default, the decree for sale and judgment were sustained.[a] And where the district court had gained jurisdiction by personal service on the defendant, its right was acknowledged to give full relief even after his death, and for this purpose to decree and execute a sale of the mortgaged premises.[b]

The district courts, however, are by the constitution clothed with original jurisdiction, in law and equity, in all civil cases where the amount in dispute exceeds two hundred dollars, exclusive of interest,[c] and it has been held that in an equity cause, the district court is possessed of all the powers of a court of chancery.[d] Hence, in the opinion of many, the district courts must be deemed to have likewise by virtue of their equity powers, full jurisdiction of the estates of minors and deceased persons, including the settlement of mortgages and the sale of property.

§ 109. The statute provides that if an execution shall have been actually levied upon any property of the deceased, before his death, the same may be sold for the satisfaction thereof, and the officer making the sale shall account to the executor or administrator for any surplus in his hands. (Sec. 141.)

It has also been decided that when the defendant dies before the lien of a judgment on his real estate expires, the property being in the custody of the law, a sale upon an execution is valid.[e] And execution was allowed to issue when the mortgagor died after decree of foreclosure, if there was no administration upon the estate;[f] and likewise where the estate was in the hands of the executrix, the court stating "the decree binds the specific premises mortgaged, and the

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[a] Hentsch v. Porter, Admin., 10 *Cal. Rep.* p. 555.

[b] Belloc v. Rogers, 9 *Cal. Rep.* p. 123.

[c] *Constitution of California*, art. VI. sec. 6.

[d] Clark v. Perry, 5 *Cal. Rep.* p. 60; Sandford v. Head et al., 5 *Ibid.* p. 297. See Wilson v. Roach, 4 *Ibid.* p. 362. This doctrine is reviewed at some length in Deck et al. v. Gerke, Admin., 12 *Ibid.* p. 433.

[e] Isaacs v. Swift, 10 *Cal. Rep.* p. 71.

[f] Nagle v. Macy, 9 *Cal. Rep.* p. 426.

property passed into the hands of the executrix subject to its lien; she can take only what remains after the lien has been satisfied."[a]

FORECLOSURE.

§ 110. In the event of default in the payment of the obligation, the mortgagee is entitled to bring an action to foreclose the mortgage. If he should delay this beyond four years after maturity of the debt, his right to a general (personal) judgment will be gone. This point, and the question whether the statute of limitations affects the mortgage itself, has been discussed before in § 67.

As the mortgagor remains owner of the property mortgaged, only limited in the exercise of the rights of ownership by his obligation towards the mortgagee not to impair the permanent value of the premises, it follows that, under the general tenor of mortgage deeds, the same reason does not exist as by the English rule, for appointing a receiver to collect the rents and profits pending the litigation on foreclosure.[b] The better opinion, however, is that the rents and profits after default, may be expressly hypothecated, so as to warrant the appointment by the court of a receiver upon default.

§ 111. A foreclosure suit is peculiarly an equity proceeding, and results in a legal ascertainment of the amount due, and in the rendition of a decree, directing the sale of the premises for its satisfaction, and the appropriation of the surplus proceeds, if any, to the payment of subsequent incumbrances, and then to the use of the owner of the premises.[c] In case of deficiency, an execution to pay the same may be issued against other property of the debtor.

Section 18[d] of the act to regulate proceedings in civil cases, passed April 29, 1851, commonly called the practice act, provides that this or any other action concerning real estate, shall be tried in the county in which the subject of the action,

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[a] Cowell et al. v. Buckelew and Wife, January T. 1860.

[b] Guy v. Ide, 6 *Cal. Rep.* p. 99.

[c] See *Practice Act*, sec. 247.

[d] *Wood's Digest*, art. 755.

or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases enumerated in sec. 21. Alien mortgagees are mostly enabled to avoid the inconvenience of bringing an action in a distant county, by instituting their suit in the United States Circuit Court, at San Francisco.

§ 112. All persons materially interested in the property and also tenants in possession, should be made parties,[a] in order that complete justice may be done and multiplicity of suits avoided, and also to give security and stability to the purchaser's title at the sheriff's sale, for the purchaser takes a title only as against the parties to the suit.[b] When valid prior incumbrances exist which are due, the bill of foreclosure will ask and the court will direct that they be first paid from the proceeds of the sale. If not due, the proceedings will be subject to such prior incumbrances.

All incumbrancers, whether purchasers, mortgagees, or otherwise subsequent to the mortgage, and existing at the commencement of the suit, are entitled to be parties, for they have an interest to be affected, and ought to have an opportunity to satisfy the prior incumbrances. If not made parties to the action, their rights are not affected by the decree or sale.[c] But they are not necessary parties to a decree as between the mortgagor and mortgagee.[d]

Incumbrancers who become such after suit brought, are not deemed necessary parties, although they are bound by the decree ; for they can claim nothing except what belonged to the person under whom they assert title, since they purchase with constructive notice.[e]

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[a] But where a prior incumbrancer should be made a party, and be obliged to appear in a foreclosure suit to protect his rights, his necessary costs shall be first paid from the proceeds of sale. Mayer v. Salisbury, 1 *Barb. Ch.* p. 546.

[b] 4 *Kent's Comm.* p. 197, 8th ed. See hereinafter, § 120.

[c] Haines v. Beach, 3 *Johns. Ch.* p. 459; Whitney v. Higgins, 10 *Cal. Rep.* p. 547.

[d] Montgomery v. Tutt et al., 11 *Cal. Rep.* p. 307.

[e] *Story's Eq. Pleadings*, § 194. The plaintiff may file with the County Recorder a notice of the pendency of the action, which shall be from the time of filing constructive notice to purchasers or incumbrancers of the property affected thereby. *Practice Act*, sec. 27, (*Wood's Digest*, art. 764.)

On the foreclosure of a mortgage executed by husband and wife, it is unnecessary to make the wife a party defendant unless it was her separate estate, or property held as homestead.[a] In the latter case she must be made a party, for legal proceedings affecting the homestead, to be conclusive against either, must embrace both.[b]

§ 113. With reference to service of the summons: sec. 25 of the practice act provides that the defendant must answer the complaint within a certain period, not exceeding forty days from service of the summons, and sec. 30 and 31 enable the court to grant an order that service be made by publication of the summons, (in which all parties to be served in that manner may be joined,) during not less than three months, where the defendant does not reside in, or is absent from the State, or cannot be found therein, in which case a copy of the summons is to be sent to such defendant, through the post office, if his residence be known. Where it appears to the satisfaction of the court that the defendant conceals himself to avoid service, it may likewise be made by publication, during such time as the court may deem proper. In any case, the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication.[c]

§ 114. In order to maintain an action for foreclosure, founded on a mortgage, the debt must first be proved, and where there was a note it must be produced, or its absence accounted for.[d]

The practice act also provides concerning the action, sec. 16:[e] "An action shall not abate by the death, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In the case of the death,[f]

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[a] Powell v. Ross. 4 *Cal. Rep.* p. 197.

[b] Revalk v. Kraemer, 8 *Cal. Rep.* p. 66; Moss v. Warner, 10 *Ibid.* p. 296.

[c] These sections give a non-resident forty days' time to answer from lapse of period of publication. Grewell v. Henderson, 5 *Cal. Rep.* p. 465.

[d] Bennet v. Taylor, 5 *Cal. Rep.* p. 502.

[e] *Wood's Digest*, art. 753.

[f] When, by the death of a defendant during the pendency of a suit, the interest of such defendant devolves upon others not already before the court, such persons should also be made parties. Lyon v. Sanford, 5 *Conn.* p. 544.

or other disability of a party, the court on motion, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party; or the court may allow the person to whom the transfer is made, to be substituted in the action."

§ 115. The court has power by its judgment to direct a sale of the property or any part of it, the application of its proceeds to the payment of the amount due on the mortgage, (or other lien or incumbrance,) with costs, and execution for the balance.[a] Or the court may in the same action enter a general judgment[b] against the maker of the note for the amount due,[c] and decree a sale of the mortgaged premises, the proceeds of which are to be credited upon the judgment.

Such general judgment becomes, from the time it is entered upon the docket in the office of the clerk of the court, a lien upon all the real property of the debtor (except in so far as the homestead attaches,) in the county, or in any other county where a transcript of the docket may have been filed with the Recorder, owned by him at the time, or which he may afterwards acquire. The lien continues for two years, unless previously satisfied.[d]

§ 116. An appeal from the judgment may be taken within one year from its rendition. (Sec. 336.) When it appears

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[a] *Practice Act*, sec. 246.

[b] Rollins v. Forbes, 10 *Cal. Rep.* p. 299; Rowe v. Table Mountain Water Co., 10 *Ibid.* p. 441; Rowland v. Leiby et al., October T. 1859.

[c] The interest due on a note, or obligation, up to the time of judgment, should be added to the principal to constitute the amount of the judgment. Montgomery v. Tutt et al., 11 *Cal. Rep.* p. 307. And interest then at the agreed rate to run on the whole judgment until paid. Guy v. Franklin, 5 *Cal. Rep.* p. 416. But, though the note may stipulate that interest at the agreed rate shall be compounded, not so with a judgment obtained on it. Such a manner of computing interest may, under the third section of the act "to regulate interest on money," (*ante*, § 62,) constitute part of the contract in writing, but is not, like the *rate* of interest, by the second section, made applicable to a judgment on such contract. Raun v. Reynolds, 11 *Cal. Rep.* p. 14. Where no rate of interest was agreed upon, the legal interest, according to the law in existence at the time and place of the contract, will be included in the judgment, and will run on the total amount thereof. See Macoleta, Ex., v. Packard, Adm., Oct. T., 1859.

[d] *Wood's Digest*, art. 938 and 941.

to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just. (Sec. 345.)[a]

Sec. 352 reads as follows:

"If the judgment or order appealed from, direct the sale, or delivery of possession of real property, the execution of the same shall not be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed any waste thereon, and that if the judgment be affirmed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency."

The appeal does not in any manner impair the lien;[b] and the statutory limitation of two years (§ 115) commences to run only from the date of the *remittitur* after the final judgment in the Supreme Court, although the lien attaches from the date of the judgment in the court below.[c]

SALE.

§ 117. Sales of real property under the decree of a court are made by the same officers, and are subject to the same regulations, as sales under execution by virtue of a judgment, and differ only herein, that the former are confined to the property mentioned in the decree, whilst the latter are restricted to the property levied on.

The plaintiff postpones the sale, if he deem it expedient, at

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[a] See Russell v. Williams, 2 *Cal. Rep.* p. 158. In many cases, such damages are given.

[b] Low et al. v. Adams, 6 *Cal. Rep.* p. 277.

[c] Dewey v. Latson et al., 6 *Cal. Rep.* p. 130. An appeal prevents the running of the statute. Castro v. Castro, 6 *Cal. Rep.* p. 158.

any time before its commencement, and even on the day announced, as often, and for as long a time as he may consider advisable.

The sales are made by the sheriff, after posting of notices and advertising for twenty days, at auction, and to the highest bidder, for cash.

§ 118. Practice act, sec. 223: " . . When the sale is of real property, and consisting of several known lots or parcels, they shall be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion shall be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately; and the sheriff shall be bound to follow such directions."

"Sec. 248. If the debt for which the mortgage, lien, or incumbrance is held, be not all due, so soon as sufficient of the property has been sold to pay the amount due with costs, the sale shall cease; and afterwards, as often as more becomes due, for principal or interest, the court may, on motion, order more to be sold. But, if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper."

§ 119. The mortgagee, as judgment creditor for any deficiency remaining after sale of the mortgaged premises, may at any time within five years after the entry of the judgment, have a writ of execution issued against any other property of the debtor, for its satisfaction; after that period the execution may only issue by leave of the court, which is not given without proof that the judgment, or some part thereof, remains unsatisfied and due. The writ requires the sheriff to satisfy the judgment with interest out of any property of the debtor. The sheriff executes the writ by levying on the property, and selling it, or so much of it as is necessary to satisfy the execution.

§ 120. The purchaser takes the property subject to all equitable liens upon it, which have not been extinguished by

the decree of foreclosure and sale, and where there are subsisting mortgages and leases, he takes subject to them.[a] It follows that, with the exception of such as are acquainted with the details of the title to the property, few persons care to buy real estate at sheriff's sale. In general, at sales, made either at auction or private, it is an understood condition that the title shall, on examination, prove to be perfect; the purchaser risks the expense, if any, of the investigation, knowing that he can obtain the property at a certain price. But a sale by the sheriff is absolute. At a sale on foreclosure therefore, the purchaser acquires the title of both the mortgagor and mortgagee, but must take it as it is, and in the uncertainty whether one will be able to buy at a suitable price, there is not much disposition to incur in advance, the expense and trouble of an examination of the title. This disadvantage may, to a great extent, be overcome by putting at the disposal of intending purchasers, an abstract of the title made by one or more searchers of title enjoying general confidence.

Besides, the question whether, and when, the property will be redeemed is another objection. True, the purchaser is, until redemption, entitled to the rent, or the value of its use, and if the property be redeemed, he receives a bonus, but the uncertainty of the continuance of the investment, and the impossibility of giving the premises before the time for redemption has expired, a permanent destination, renders a purchase at a sheriff's sale less desirable.

For these reasons, and to save the costs of foreclosure, an understanding is often arrived at between the mortgagee and the mortgagor, when it becomes necessary to dispose of the property, if this mode has not before been agreed upon,—to have the premises sold at auction, or at private sale; but when this is not done, the premises must sometimes be bought by the mortgagee,[b] or some one in his behalf, so as to secure the full value on a resale.

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[a] See Johnson v. Dopkins, 3 *Cal. Rep.* p. 391.

[b] The possibility hereof is no drawback to mortgages, but, wherever this contingency might arise, it forms the principal reason why a much greater margin in value, than is usual in most other countries, is required in the case of loans on real property in this State.

After sale the officer making the same, furnishes the purchaser with a certificate of purchase.

REDEMPTION.

§ 121. In this State the mortgagor has a statutory right of redemption after sale under foreclosure, and so has each of his creditors, holding a subsequent lien by judgment or mortgage.

This right of redemption is based upon the 229th sec. of the practice act,[a] stating that upon a sale of real property under execution, the real property sold, or any part sold separately, shall be subject to redemption.

It may be doubted whether the right of redemption there provided, except as regards sales of property under execution for a deficiency, has been rightly held applicable to sales of mortgaged premises under foreclosure of the mortgage. In a strictly legal point of view it would appear unnecessary to stretch the meaning of the section so as to include such sales, whilst certainly in equity the mortgagor can hardly be considered entitled to so much leniency. He has known when the debt would be due; he has had it in his power to avail himself of his equitable right of redemption, until the suit in foreclosure, of which he had due notice, resulted in a sale of the premises mortgaged. He had ample time to save his estate, if he had the will and the means.

But the former interpretation of the statute, holding it applicable to such sales, is binding upon all parties, under the decisions of the Supreme Court of this State.[b]

In but very few cases this right of redemption from sales

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[a] *Wood's Digest*, art. 963. The statute allowing redemption of land sold under execution, is inoperative where the debt upon which judgment was obtained, had been contracted before its passage. Seale v. Mitchell, 5 *Cal. Rep.* p. 401.

[b] Kent et al. v. Laffan, 2 *Cal. Rep.* p. 595, reaffirmed in the case of Harlan v. Smith, 6 *Ibid.* p. 173, and in that of McMillan v. Richards et al., 9 *Ibid.* p. 565. In the latter case the court, in an unanimous opinion, used the following language: "Whether this decision would be now made, were the question an open one, it is unnecessary to determine. It has been repeatedly recognized as law by this court, and has been acted upon by parties for years; rights of property have been acquired under it, which we are not at liberty at this day to disturb."

on foreclosure of mortgage has been availed of by the parties in interest. The right alluded to has therefore been of very little benefit to mortgagors, and at the present day this same statutory right of redemption operates greatly to their disadvantage, for lenders of money, want a much larger margin in the value of the security than they would otherwise require, on account of the delays which may result from it. (Referred to in § 120.)

§ 122. The following parties, or their successors in interest, are entitled to redeem: 1. The judgment debtor. 2. A creditor (termed a redemptioner,) having a lien by judgment or mortgage, subsequent to that on which the property was sold.[a] (Sec. 230.)

The act further provides:

Sec. 231, as amended March 28, 1859: "The judgment-debtor, or a redemptioner, may redeem the property from the purchaser within six months after the sale, on paying the purchaser the amount of his purchase, with twelve per cent.[b] thereon in addition, together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase, and interest on such amount. After the sale of any real estate, the judgment under which such sale was had shall cease to be a lien upon such real estate."[c]

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[a] That is, any such lien which has attached subsequent to that on which the property was sold, and before the expiration of the time allowed for redemption. McMillan v. Richards, 9 *Cal. Rep.* p. 365.

[b] Where the debt was contracted before the passage of the amendatory act, and under the operation of the original act, eighteen per cent. will have to be paid on redemption, and six per cent. when redeeming from a previous redemptioner.

[c] A sale under a judgment does not extinguish the balance of such judgment, for any purpose whatever, until the deed of the Sheriff is actually executed under such sale; nor does the sale under one judgment cut off the lien of a subsequent judgment, until the execution of such deed. The expiration of six months after the sale has of itself no such effect. People ex rel. McMillan v. Visher, 1 *Labatt's Rep.* p. 98. If the mortgagee or creditor purchases the property for a *less* amount than the judgment, the sale does not extinguish the lien of the judgment for the residue, and the mortgagor, or any redemptioner having a lien subsequent to that of the purchasing creditor, must, in order to redeem, pay the full amount of the judgment, with twelve per cent. thereon, irrespective of the amount for which the property was sold. Vandyke v. Herman et al., 3 *Cal. Rep.* p. 295; Knight v. Fair, 9 *Ibid.* p. 117; McMillan v. Richards, 9 *Ibid.* p. 365.

§ 123. Sec. 232, as amended March 28, 1859: "If the property be so redeemed by a redemptioner, either the judgment-debtor or another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner, on paying the sum paid on such last redemption, with four per cent. thereon in addition, and the amount of any assessment or taxes which the said last redemptioner may have paid thereon, after the redemption by him with interest on such amount. The property may be again, and as often as the debtor or redemptioner is so disposed, redeemed from any previous redemptioner within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with four per cent. thereon in addition, and the amount of any assessments or taxes which the last previous redemptioner paid, after the redemption by him, with interest thereon.

"Notice of redemption shall be given to the sheriff. If no redemption be made within six months after the sale, the purchaser, or his assignee, shall be entitled to a conveyance, or if so redeemed, whenever sixty days have elapsed and no other redemption has been made, and notice thereof given, the time for redemption shall have expired, and the last redemptioner, or his assignee, shall be entitled to a sheriff's deed. If the debtor redeem, at any time before the time for redemption expires, the effects of the sale shall be terminated, and he be restored to his estate."

§ 124. "Sec. 233.[a] The payment mentioned in the last two sections may be made to the purchaser or redemptioner, as the case may be, or for him, to the officer who made the sale; and a tender of the money shall be equivalent to payment."

"Sec. 234: A redemptioner shall produce to the officer or person from whom he seeks to redeem, and serves with his notice to the sheriff:

1st. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court, or of the county where the judgment is docketed; or if he redeem upon a mortgage or other lien, a note of the record thereof certified by the recorder.

2d. A copy of any assignment necessary to establish his

[a] *Wood's Digest*, art. 967.

claim, verified by the affidavit of himself or of a subscribing witness thereto, and

3d. An affidavit by himself, or his agent, showing the amount then actually due on the lien."[a]

§ 125. "Sec. 235. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it shall not be deemed waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it, in the same manner in which it was previously used; or to use it in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon; or to use wood or timber on the property therefor; or for the repair of fences; or for fuel in his family, while he occupies the property."

§ 126. The purchaser from the time of the sale until a redemption, and the redemptioner, from the time of his redemption until another redemption, shall be entitled to receive from the tenant in possession,[b] the rents of the property sold, or the value of the use and occupation thereof.[c]

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[a] The title to redeem is a statutory right, given only in the event of a tender and production of *certain statutory proofs*, and a strict compliance with the laws that give it must be shown. This constitutes *a qualification of the right of the creditor*. He must not only have his right, but, to entitle him to redeem, he must present the specified evidence. Waller v. Harris, 20 *Wend.* 561; Haskells v. Manlove, July T. 1859.

[b] The judgment-debtor, or mortgagor, in possession, is in legal contemplation no less a tenant than the man who occupies under him. Harris v. Reynolds et al., April T. 1859.

[c] *Wood's Digest*, art. 970. The purchaser can sue the tenant in possession for the rent, as often as it falls due, under the terms of lease existing when he became purchaser. The effect of the sale is equivalent to an assignment of the lease for the time. Reynolds v. Lathrop, 7 *Cal. Rep.* p. 43. But the terms of the lease made by the owner of the premises might render the statute apparently nugatory; and it was held, that where the lease was for a term of years, and the rent was paid in advance, the purchaser under the mortgage sale can require the tenant to pay the rent over again to him. McDevitt v. Sullivan, 8 *Cal. Rep.* p. 592. Where the mortgagor contests the validity of the sale, and continues to receive the rents and profits during the time set for redemption, he will be considered as a trustee of the fund, and, if it be in danger of loss, chancery will protect the trust property; for instance, by compelling the mortgagor to pay the rents and profits into court,

§ 127. The estate of the mortgagor does not become vested in the purchaser, or redemptioner, by mere lapse of the time allowed by the statute for redemption.[a] The possession does not change to him, until a consummation of the sale by the sheriff's conveyance, to which at the expiration of that time he is entitled, as he is likewise to an order from the court to be placed in possession, unless a direction to that effect is contained in the decree of foreclosure; and if that upon its service should be disregarded, the court will issue a writ of assistance, under which possession will be given.[b]

§ 128. This statutory right of redemption, in some instances, exists where there is no equity, and in other instances, in connection with the equitable right. Parties to the suit in which the judgment is rendered, under which the sale is made, and who are entitled to redeem, are restricted by the statute to six months. (§ 122.) Parties acquiring a new interest, pending suits to enforce previously existing liens, taking their interests in subordination to any decree which may be rendered, have no equity and are confined to the rights given by the statute; and so as a consequence, are those whose interests are acquired after judgment docketed or sale made. But parties obtaining interests subsequent to the plaintiff, and before suit brought, who are not made parties to such suit, possess both the equitable and the statutory right. Not having been made parties to the suit, their *equity of redemption* has not been affected by the decree and sale. They may redeem under the statute, or they may file their bill in equity.[c]

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until the points at issue between him and the purchaser shall have been adjudicated. Harris v. Reynolds et al., April T. 1859; Reynolds, Admin., v. Harris, January T. 1860.

[a] Vaughn v. Ely, 4 *Barb.* 159. Until consummation of the sale by conveyance, the estate remains in the mortgagor, as it does by sale under execution in the judgment-debtor; and the conveyance, when executed, will take effect, in the one case, from the date of the mortgage, as it does in the other from the time the lien of the judgment attached. McMillan v. Richards, 9 *Cal. Rep.* p. 365.

[b] As against all the parties to the suit, the title is gone; and as the right to the possession, as against them, follows the title, it would be an useless and vexatious course to require the purchaser to obtain such possession by another suit. Montgomery v. Tutt et al., 11 *Cal. Rep.* p. 190.

[c] Whitney v. Higgins, 10 *Cal. Rep.* p. 547.

CHAPTER VII.

DEEDS OF TRUST.

§ 129. Real estate may be conveyed to a trustee, or trustees, in trust, to secure the payment of a certain debt of the grantor.

In England and in some of the United States, mortgages are frequently taken in this form. In California this has not often been the case. Our statutes do not directly authorize this mode of securing a debt by real estate, and some of the decisions of the Supreme Court contain such general terms in defining the nature of mortgages, under which the title of the debtor could not be divested, except by a judicial foreclosure and sale, subject to redemption, that it was deemed uncertain whether our courts would not hold that a debt could not be realized under such deeds of trust, under our statutes, unless in the same way, by foreclosure and sale, subject to redemption, which would take away the advantages elsewhere derived from a conveyance in trust in the manner alluded to.

Recently, however, the question of the validity of these deeds of trust, has presented itself before the Supreme Court of this State in the case of *Koch* v. *Briggs*,[a] and in the judgment rendered therein, the principle involved in such deeds was fully sustained.

§ 130. The deed of trust upon which the suit was based, contained the provisions usual in such instruments; that in case of default in the payment of the note or interest, and upon the application of the holder of the note, the trustee would sell the premises,[b] at auction, at a designated place, to

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[a] October T. 1859.

[b] The legal estate is vested in the trustee, (*Hill on Trustees*, p. *231;) but the power to sell can only be exercised under the circumstances and in the manner pointed out by the deed. Walker v. Brungard, 13 *Sm. & M.* p. 723.

the highest bidder for cash, after previous publication of notice, and execute to the purchaser a good and sufficient deed of the same, and out of the proceeds, after satisfying the expenses, pay the principal and interest, rendering the surplus, if any, to the grantor or his representatives.

§ 131. The court unanimously decided that sec. 260 of the Practice Act,[a] could not be made to apply to this deed, and pointed out the difference between such conveyance in trust, and a mortgage, in the following terms:

"Where there is a mortgage, there is a right, after condition broken, to a foreclosure on the part of the mortgagee, and a right of redemption on the part of the mortgagor. The right to foreclose, whether resulting in vesting an absolute title to the property in the mortgagee, as formerly in England, or in a judicial sale of the premises, as in this State, exists in all cases of mortgage, after breach of condition, as does also the right to redeem the property from forfeiture, or from the incumbrance of the lien. These two rights are mutual and reciprocal. When the one cannot be enforced, the existence of the other is denied, and when either is wanting, the instrument, whatever its resemblanee in other respects, is not a mortgage.

"In reference to the deed in question, no suit for a foreclosure, as in cases of mortgage in England, would lie, for there could be no forfeiture of the estate to enforce, and of course no equity as against such forfeiture, to foreclose. Nor would a suit lie for a foreclosure under our system—that is, for a decree adjudging a sale of the premises and the application of the proceeds to the payment of the debt, as such suit could only be based upon the contract of the parties, and the contract here is only that upon the happening of a certain event the trustee shall sell. Equity could not adjudge a sale, as in case of a mortgage, without disregarding the express contract of the parties, and making a new and different one.

"Equity would limit its relief to the contract made, and effectuate a sale only by enforcing the performance of the trust.

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[a] See *ante*, § 63.

"Nor would any equity of redemption exist if the trust was performed, for, in its execution, no forfeiture would be asserted from which relief could be sought. In performance of the trust the contract of the parties—in fact and intention—would be carried out, whereas in mortgages, the form of contract is one of conveyance, while in truth the contract is one only of security, and the equity is enforced to give effect to the intent of the parties against the legal consequences of the form of their undertaking." [a]

§ 132. This decision is likely to have some influence upon the manner of securing money on real estate, in California, and may cause deeds of trust to be frequently substituted for mortgage deeds, as deeds of trust, in case of default, will lead to a considerable saving in time and expense, whilst the absence of any right of redemption, will render the property immediately available for the purchaser.

§ 133. The deed whereby the trust is created, may provide for the appointment of a new trustee, to supply the vacancy, which might be occasioned by the resignation, or the death, or incapacity of the trustee originally appointed. If the deed contains no such power, and in general, wherever circumstances render it necessary to appoint new trustees, the Court of Chancery, in the exercise of its inherent jurisdiction, will interpose upon a proper application, and make the appointment. It is said,[b] and universally admitted: "There is no equitable doctrine more firmly established, than that a trust, once properly created, shall never fail on account of the death, disability, or non-appointment of the trustee."

The statute of limitations will not run against a trust created by deed for the payment of a debt.[c]

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[a] These views are sustained by several authorities. Under similar circumstances, in Sampson v. Pattison, 1 *Hare*, p. 536, the court says: "There is no right of foreclosure arising out of such a contract." "The form of the security points out the manner in which the trust is to be worked out and payment obtained; . . . . . and after a certain time, if payment is not made, the trustee may sell the estate." And in Reese v. Allen, 5 *Gilman*, p. 239, the court state: "We cannot hold this to be a mortgage, without saying that the manifest and clearly expressed intention of the parties shall cease to be the rule of construction."

[b] *Hill on Trustees*, preliminary chapter, § iii.

[c] *Hill on Trustees*, p. 341.

CHAPTER VIII.

LIMITATION.

§ 134. The act of April 22, 1850, defining time of commencing civil actions, amended April 11, 1855, and known as the Statute of Limitations,[a] is calculated to have a beneficial effect on titles to real property. The peculiar circumstances under which this State was peopled, by men from many countries, governed by various systems of law, the eagerness and rapidity with which real estate changed hands, etc., has caused numberless irregularities, often amounting to fatal defects, in the terms of documents, as well as in the manner of execution and acknowledgment.

The above statute, amongst other purposes, is intended to take away the effect of imperfection of title, or of loss of documents in many cases, through the prevention of litigation, by fixing a period beyond which a party is not allowed to enforce a claim. The act takes effect in general from its date, but as regards actions for the recovery of real estate, from the date of the amendatory act (April 11, 1855,) whereby sec. 6 amongst others was amended and re-enacted,[b] and though not directly concerning mortgages, the act will from April 1860, be so intimately connected with the subject of

[a] There is one limitation affecting real estate, which is not contained in the statute of limitations; that, namely, which is found in the eleventh section of another statute, known as the settlers act, passed March 26, 1856, (*Wood's Digest*, art. 2755,) providing that "no action of ejectment, or other actions to recover the possession of lands, shall hereafter be sustained, unless such action shall have been commenced within two years after the cause of action accrued," etc. The decision in Billings v. Hall, 7 *Cal. Rep.* p. 1, concerning the settlers act, does not appear to affect the section here quoted, the operation whereof, however, is supposed to be confined to cases arising within the scope of the act.

[b] Billings v. Harvey et al., 6 *Cal. Rep.* p. 381; Billings v. Hall, 7 *Ibid.* p. 1.

title to land, that some of its principal provisions may appropriately find a place here :[a]

"Sec. 1. Civil actions can only be commenced within the periods prescribed in this act, after the cause of action shall have accrued, except where a different limitation is prescribed by statute."

"Sec. 2. When the cause of action has already accrued, the party entitled and those claiming under him shall have, after the passage of this act, the whole period herein prescribed, in which to commence an action."

§ 134.* "Sec. 3. The people of this State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless : 1. Such right or title shall have accrued within ten years before any action or other proceeding for the same shall be commenced ; or unless, 2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years."

§ 135. "Sec. 6. No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question, within five years before the commencement of such action ; *provided, however*, that an action may be maintained by a party claiming such real estate, or the possession thereof, under title derived from the Spanish or Mexican governments, or the authorities thereof, if such action be commenced within five years from the time of the final confirmation of such title by the government of the United States, or its legally constituted authorities."

"Sec. 7. No cause of action, or defense to an action, founded upon the title to real property, or to rents, or to services out of the same, shall be effectual, unless it appear, that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in ques-

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[a] *Wood's Digest*, art. 1, et seq.

tion, with five years before the commencement of the act, in respect to which such action is prosecuted, or defense made, or unless it appear that the title to such premises was derived from the Spanish or Mexican governments, or that the same was confirmed by the government of the United States or its authorities, within five years before the commencement of such action."

"Sec. 9. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises, shall be presumed to have been possessed thereof, within the time prescribed by law, and the occupation of such premises by any other person shall be deemed to have been under, and in subordination to, the legal title, unless it appear that such premises have been held and possessed adversely to such legal title, for five years before the commencement of such action."

§ 135.* "Sec. 16. If a person entitled to commence any action for the recovery of real property, or to make an entry or defense, founded on the title to real property, or to rents or services out of the same be, at the time such title shall first descend or accrue, either: 1. Within the age of twenty-one years; or 2. Insane; or 3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life; or 4. A married woman: the time during which such disability shall continue shall not be deemed any portion of the time in this act limited for the commencement of such action, or the making of such entry or defense, but such action may be commenced, or entry or defense made, within the period of five years after such disability shall cease, or after the death of the person entitled, who shall die under such disability; but such action shall not be commenced, or entry or defense made, after that period."

§ 136. "Sec. 17. Actions, other than those for the recovery of real property, can only be commenced as follows: Within five years—An action upon a judgment or decree of any court of the United States, or of any State or territory within the United States. Within four years—An action upon any contract, obligation, or liability founded upon an

instrument of writing,"[a] except such judgment or decree, etc.[b]

"Sec. 21. An action shall be deemed to be commenced within the meaning of this act, when the complaint has been filed in the proper court."

§ 137. "Sec. 22. If when the cause of action shall accrue against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State; and if, after the cause of action shall have accrued, he depart the State, the time of his absence shall not be part of the time limited for the commencement of the action."

"Sec. 25. When a person shall be an alien subject, or citizen of a country at war with the United States, the time of the continuance of the war, shall not be part of the period limited for the commencement of the action."

§ 138. "Sec. 26. If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his heirs or representatives may commence a new action within one year after the reversal."

"Sec. 27. When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuation of the injunction or prohibition shall not be part of the time limited for the commencement of the action."

§ 139. "Sec. 28. No person shall avail himself of a disability, unless it existed when his right of action accrued."

"Sec. 31. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this statute, unless the same be contained in some writing, signed by the party to be charged thereby."

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[a] See, as to the effect of this limitation, upon mortgages, *ante*, §§ 66, 67. The fact that the contract was in writing, and not the present existence of the writing, determines the period within which the action must be brought. The highest evidence of that fact is, of course, the writing itself; but in case of its loss or destruction, the fact may be established by parol. Bagley v. Eaton, 10 *Cal. Rep.* p. 126.

[b] For foreign judgments, and instruments of writing executed out of this State, shorter periods have been established, by acts of May 4, 1852, and April 2, 1855, (*Wood's Digest*, art. 32–34.)

ERRATA AND ADDENDA.

Page VIII, line 19, for "by alcalde and" read: by the alcalde, and by the

" ", over § 39 should be inserted the heading: RECORD which now appears over § 43 on page IX.

" XI, in § 86, for "inproving" read: improving

" XII, from the next page to this, over § 121, should be transferred the heading: REDEMPTION.

" XV, after line 12, insert:

For this purpose it was necessary to quote, either at large or merely by reference, not only laws, but also judicial decisions, which however often likewise cover other, and some times more important points, than those which they are intended to confirm or illustrate in these pages.

" ", line 13, for "comparitively" read: comparatively

" ", " 19, for "cited;" read: cited,

" 3, " 26, "if he be a friend." As during war his alienage may, under some circumstances, be, for the time, objected to, the reader might here have been referred to § § 16—26.

" 6, note [a]. The treaty of Amity and Commerce which the Governments of the United States and the Netherlands, "desiring to ascertain", as stated in the document itself, "in a permanent and equitable manner, the rules to be observed relative to the commerce and correspondence, which they intend to establish between their

respective states, countries and inhabitants," concluded in 1782, came in December 1831 before the Supreme Court of North Carolina, in the case of the Trustees of the University v. Joshua Miller, (3 Dev. p. 188.) The decision of the matter at issue depended in the first place on the question whether said treaty, which in itself contains no limitation, continued in force, and the court say: "We can know our exterior relations only through that branch or organ of the government, appointed by the form of it, to represent us and to act for us with foreign powers. The case states, that that organ or department of the Government, still considers the treaty as binding;" etc. The court further explained what must be understood by the word "effects," in the sixth article, and decided that the treaty was intended to embrace all kinds of property, and that real estate must be considered as included in the term "effects."

The treaty is found in the eighth volume of the "Public Statutes at Large of the United States," published in 1855 by authority of Congress, and without any addition, as with other treaties, showing it to be no longer in force. Yet there has been for some time a difference of opinion on this point between the two Governments, and the State Department at Washington desires the treaty to be considered as no longer in force, a fact which was not within the author's reach when the foregoing pages went to press at San Francisco.

That the rights of alien-mortgagees are, in general, equally well protected without this treaty, already proceeds from § § 4—9, and, with reference to a state of war, this question is again alluded to below, at page 13.

Page 8, line 1, for "a serious objection exists" read: no such danger of partiality need be apprehended, and hence there exists a serious objection

" ", line 6, after "States," insert: and they do not

interfere with the jurisdiction of the latter without urgent motive.

Page 9, in note [c] to § 14, lines 24, 25, 26, for "In suits — jurisdiction" read: In suits founded upon mortgages, justice would in many instances not be fully administered by a decision only founded upon Common law principles, and they are therefore generally brought in law courts having equity jurisdiction. In California suits for the foreclosure of mortgages can not be brought in any other courts, that is, they must be brought before the United States Courts, or in the District Courts instituted by the Constitution of the State, all of which have jurisdiction in equity as well as in law.

And add at the close of the note: The same eminent judge remarks elsewhere (Jackson v. Willard, 4 Johns. p. 42): "Mortgages have been principally the subject of equity jurisdiction. They have been considered in those courts in their true nature and genuine meaning; and the rules by which they are governed are settled upon clear and consistent principles."

" 11, note [d], line 11, "money lent to the public." That is: money lent to the State, to the people; the national debt.

" 13, note [b]. The question as to the efficacy at the present time, of this treaty with the Netherlands, has been already discussed above at page 6. It would appear however, that, in accordance with the general views of the two most eminent American writers on International Law, (see note [a], page 14,) article XVIII, even if the treaty be otherwise inoperative, should retain its effect until cancelled by mutual agreement.

The liberal disposition and enlightened policy of the American Government, with reference to the subjects of hostile nations and their property, in general, will best appear from an act of Congress, which was passed as early as July 6, 1798,

when with a view to the protection in the event of war, of such alien enemies as were not already protected by treaty stipulations, and were not chargeable with actual hostility or other crime against the public safety, — the President of the United States was authorized to permit their residence in certain cases, and also to "ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality," which should be allowed to them, "for the recovery, disposal and removal of their goods and effects, and for their departure."

Goods, funds, and other effects of alien enemies, imported before the war, are generally considered entitled to protection during such a period after its commencement, as will allow of their disposal and removal.

The United States will no doubt, should war again threaten, pursue a similar course, by maintaining the above provisions, or by enacting such other regulations as are in keeping with the progress of humane sentiments in the present age, particularly as regards alien enemies and their property. And there appears to be no ground whatever to apprehend that any such law will ever be passed, as has been shown in § 20 not to have been enacted up to the present time.

Page 15, line 19, after "alluded to" insert: (see § 7.)

" 17, " 1, after "to sue" insert: in the cases where it exists in time of war,

" ", line 9, after "countries. [b]" insert: This is no doubt also the case with such rights or debts originating during war, as have not been judicially declared forfeited previous to its termination.

" 20, note [b]. The other pretended claim of great importance, the Santillan, or Bolton and Barron claim, has recently been declared worthless by the Supreme Court of the United States.

Page 22, § 31. Already by act of March 3d 1851, Sec. 13, it had been made the duty of the Surveyor General of California to cause all private land claims which have been finally confirmed to be accurately surveyed, and to furnish plats of the same. These plats or surveys have also to be filed, like those of the public lands, in his office as well as in the general land office at Washington.

" 30, in the note, line 12, for "a Consul" read: Consul

" 42, line 14, after "exist" insert: at the time of the execution of the mortgage

" 45, erase lines 18, 19, 20, "But — stipulations," and insert instead:

The rights of husband and wife are governed by this act, except in so far as its provisions may be in conflict with the stipulations of any marriage contract. See Sec. 14 and 15. The marriage contract must be executed and acknowledged, in like manner as a conveyance of land, and has to be recorded in the county in which the parties reside, and in every county in which any real estate may be situated which is conveyed or affected by it. See Sec. 16 and 17.

" 49, line 7, after "mortgagor" add: or owner of the property, and against occupation of the premises not permitted by the policy,

" 54, line 15, for "or" read: or,

" ", " 16, for "time," read: time; —

" ", " 18, erase "given"

" ", " 22, for "incumbrance" read: incumbrance,

" 59, " 7, for "The lien" read: Unless expressly released, the lien

" 62, line 6, for "vests" read: vest

" 67, " 6, add: See § § 10—13.

" 68, " 7, for "summons:" read: summons,

" 73, " 23, after "and" insert: could procure

" 74. See page XIV.

" 78, line 26, for "instruments;" read: instruments:

" 83, " 1, for "with" read: within

Page 83, § 136. In connection with Sec. 17, and in addition to various causes which may extend the different periods limited as specified in this act, must be observed what has been remarked in § § 66—68, about the continuation of the lien on mortgaged property, and of the right to foreclose, even where the mortgagee has allowed his right of *personal* action against the mortgagor to be lost through lapse of time; — and in § 98 note [b] about giving new promissory notes in payment of the original notes, whereby (see Sec. 31 in § 139,) the mortgagee's right to a personal action is continued until expiration of the period allowed by the Statute, after maturity of such new promissory notes.

J. DE F.

's GRAVENZANDE, HOLLAND,
June, 1860.

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